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Supreme Court of the United States

OCTOBER TERM, 1994

CLARK EQUIPMENT COMPANY AND FORKLIFTS, INC.,
Petitioners,

v.

CONNIE L. HABECKER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN R. HABECKER, DECEASED, AND JOHN MICHAEL HABECKER, MINOR, BY CONNIE L. HABECKER, HIS PARENT, NATURAL GUARDIAN AND NEXT FRIEND,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

DAVID C. FIELD
CLARK MATERIAL HANDLING COMPANY
333 West Vine Street
Lexington, KY 40507
(606) 288-1216

STANLEY V. BOYCHUCK
SWANSON, MARTIN & BELL
One IBM Plaza
Chicago, IL 60611
(312) 321-9100

RICHARD W. HOLLSTEIN
THOMAS J. COLE
CLARK, LADNER, FORETENBAUGH & YOUNG
2005 Commerce Square-21st Floor
Philadelphia, PA 19103
(215) 241-1800

JOHN A. STATLER
GOLDBERG, KATZMAN & SHIPMAN, P.C.
320 Market Street
Strawberry Square
P.O. Box 1268
Harrisburg, PA 17108-1268
(717) 234-4161

VICTOR E. SCHWARTZ *
ROBERT P. CHARROW
JOSEPH N. ONEK
LISA A. PRICE
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2500
Attorneys for the Petitioners

* *Counsel of Record*

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals Err in Reversing a Civil Judgment Using the Criminal Harmless Error Standard, In Conflict with Three Other Circuits?

2. Did the Court of Appeals Err in Excluding Expert Evidence Admissible Under the Federal Rules of Evidence, but Inadmissible Under a State's Substantive Law?

PARTIES TO THE PROCEEDINGS BELOW

This case arises from a judgment of the United States Court of Appeals for the Third Circuit which reversed the judgment of the United States District Court for the Middle District of Pennsylvania. Petitioners and Respondents, as captioned, are the only parties. Petitioners' Rule 29.1 Listing is set out below.

Petitioner Clark Equipment Company has no parent corporation and has one nonwholly-owned subsidiary, VME Group N.V. Petitioner Forklifts, Inc. is a privately held corporation; it has no parent corporation nor does it have any subsidiaries.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Clark Equipment Company and Forklifts, Inc., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit dated September 16, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals dated September 16, 1994, is reported at 36 F.3d 278 (3d Cir. 1994) and is set forth in the Appendix at 1a-24a. Memorandum orders of the United States District Court for the Middle District of Pennsylvania, dated February 2, 1993

and March 31, 1992, the latter reported at 797 F. Supp. 381 (M.D. Pa. 1992), are set forth in the Appendix at 50a-57a and 58a-86a, respectively. The judgment of the United States District Court for the Middle District of Pennsylvania, dated February 12, 1993, is set forth in the Appendix at 88a. The opinions of the Court of Appeals, dated August 21, 1991 and January 8, 1990, are reported at 942 F.2d 210 (3d Cir. 1991) and 893 F.2d 49 (3d Cir. 1990), respectively, and are set forth in the Appendix at 25a-39a and 40a-49a, respectively.

JURISDICTION

The opinion of the Court of Appeals was issued and judgment entered on September 16, 1994. A timely petition for rehearing, filed by Clark, was denied on October 14, 1994 (App. 87a). This petition is filed within ninety days of the judgment of the Court of Appeals. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1) (1988).

STATUTORY PROVISIONS INVOLVED

The harmless error restriction on appellate review was enacted by Congress in 1949, Pub L. No. 81-72, 63 Stat. 105 (1949) (codified at 28 U.S.C. § 2111 (1988)) and provides as follows:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

The Federal Rules of Evidence were enacted by Congress in 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975). Rules 702, 703, and 705, as amended, provide as follows:

> Rule 702. Testimony by Experts
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinon

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

STATEMENT OF THE CASE

This case sharply focuses on two crucial recurring issues which have either vexed or divided the circuits for decades. First, in civil cases, what standard should a federal appeals court use in gauging whether an error is "harmless" under 28 U.S.C. § 2111? There is a clear split in the circuits. Three circuits, including the Third Circuit, use the criminal standard in civil cases and affirm only if it is "highly probable" that the error did not affect the outcome of the case. In contrast, three other circuits use the normal civil standard and affirm if it is "more probable than not" that the error did not affect the outcome.[1] The

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[1] The Third, Eleventh, and District of Columbia Circuits use the criminal standard in civil cases (*i.e.*, highly probable that the error did not affect substantial rights), thereby mandating re-

difference in the two standards is not merely a matter of semantics; it has a profound and measurable effect on appellate decision-making. Empirical evidence reveals that circuits using the "highly probable" standard reverse nearly 40 percent more often than those circuits using the "more probable than not" standard. The conflict between the circuits is an outgrowth of a deep and fundamental disagreement over the nature of the appellate process.[2]

This products liability case provides an unusually well-honed vehicle for resolving the circuit conflict. The case has been tried three times. Each time the jury returned a defense verdict, and each time the Third Circuit reversed and remanded for a new trial. As this Court noted, "[a] trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean" where the supposed error was technical and by all objective criteria, minor. *Mc-*

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versal in civil cases even though the error may have had no effect on the jury's verdict. In contrast, the Eighth, Ninth, and Tenth Circuits only reverse if the error "more probably than not" affected the substantial rights of the parties. *Compare Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1022-23 (D.C. Cir. 1990), *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924-27 (3d Cir. 1985) *and Aetna Casualty and Sur. Co. v. Gosdin*, 803 F.2d 1153, 1159 (11th Cir. 1986) *with U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1252-53 & n.39 (10th Cir. 1988), *McIlroy v. Dittmer*, 732 F.2d 98, 105 (8th Cir. 1984), *and Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983). One court, in discussing the circuit conflict, classified the Seventh Circuit as using the "more probable than not" standard. *See Williams v. United States Elevator Corp.*, 920 F.2d at 1023 n.5. However, it appears that the Seventh Circuit has yet to resolve this issue. *See Smith v. Chesapeake & Ohio Ry.*, 778 F.2d 384, 389 (7th Cir. 1985).

[2] Commentators have also been sharply divided on the appropriate standard of review in civil cases. *Compare* ROGER TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970) ("Traynor") *with* Stephen Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973) ("Saltzburg").

Donough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555 (1984). Yet here, the Court of Appeals, using the Third Circuit standard, "wipe[d] the slate clean," not once, but three times. Moreover, this is a case where the standard of review would have affected the outcome on appeal. By all objective criteria—including the assessments of three juries—this was not a close case. The supposed error that triggered reversal likely had little impact on the jury's decision-making because it involved the admission of evidence that was, based on the Third Circuit's speculation, irrelevant under state law; it was admissible under the Federal Rules. The admission of irrelevant evidence should have less of an impact on jury decision-making than the exclusion of relevant evidence. *See* Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021 (1977); Fed. R. Evid. 401. Had the Court of Appeals used the correct standard—the one adopted by three of its sister circuits—it would have been compelled to find that the error, if one occurred at all, was harmless.

The second issue raised by this case involves the supposed error that triggered reversal, namely, may a federal court exclude from jury consideration scientific and technical studies relied upon by an expert in forming his opinion, if such studies would be irrelevant under the court's view of the state's substantive law, but are relevant to test the expert's ultimate opinion under the Federal Rules of Evidence? The Third Circuit apparently believes that federal courts must act to promote state substantive law even to the extent of excluding evidence admissible under the Federal Rules of Evidence.

Specifically, in this case, the Court of Appeals refused to permit the opinions of expert witnesses to be tested or evaluated, as authorized by Fed. R. Evid. 702, 703, and 705, and as mandated by this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). To do so, in the opinion of the court, would have conflicted with the court's speculation about the

contours of Pennsylvania's substantive law of torts. App. 10a-16a. Thus, the appeals court expressly forbade counsel from questioning experts either about the scientific studies and data underlying their opinions or about whether their opinions were consistent with those in the published literature or generally accepted by the research and engineering community. The court imposed these extraordinary restrictions out of the mistaken belief that to do otherwise would permit the jury to hear evidence that, in the court's view, was irrelevant under Pennsylvania's so-called "crashworthiness doctrine." App. 13a. Whether the court's view of Pennsylvania law is correct is not at issue here. What is at issue is whether the Federal Rules of Evidence and a party's right to examine expert witnesses to learn the basis of their opinions may be eviscerated by a federal court in order to foster a state's substantive law.

The relationship between the requirements of the Federal Rules of Evidence and conflicting aspects of state substantive law has proven to be troublesome for the federal courts. *See Oberst v. International Harvester Co.*, 640 F.2d 863, 867 n.2 (7th Cir. 1980) (Swygert, J., dissenting). The courts of appeals have wrestled with this issue for almost two decades without reaching a definitive result.[3] Clarification by this Court is necessary.

A. Background and Facts

This products liability case has been tried three times.[4] Each time the jury returned a verdict in favor of the

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[3] *Compare Rovegno v. Geppert Bros., Inc.*, 677 F.2d 327 (3d Cir. 1982) (relying on state law to exclude blood alcohol level in negligence case) *with Ballou v. Henri Studios, Inc.*, 656 F.2d 1147 (5th Cir. 1981) *and Levitt v. H.J. Jeffries, Inc.*, 517 F.2d 523 (7th Cir. 1975) (both relying on Federal Rules of Evidence to uphold admissibility of blood alcohol level in negligence case).

[4] Each trial was held in the United States District Court for the Middle District of Pennsylvania pursuant to that court's diversity jurisdiction under 28 U.S.C. § 1332.

defendants; each time the plaintiffs appealed, and each time the Third Circuit reversed and remanded the case for a new trial. Ironically, the Third Circuit's quest for "perfection" has had only one demonstrable effect: in each succeeding trial, it took the jury less time to render its verdict in favor of the defendants.[5]

This case involves a forklift manufactured in 1977 by the defendant Clark. In 1984, Habecker, a government employee, was using a Clark forklift to unload cargo from the rear of a freight trailer. The floor of the trailer was four feet above the ground. To provide access to the trailer, Habecker moved a portable ramp to the rear of the trailer. The forklift could then be driven up the ramp and into the trailer, permitting him to load and unload cargo. Habecker failed to properly secure the ramp to the trailer. During the course of unloading freight, the ramp moved away from the trailer and swiveled 90 degrees while dropping to the ground. The forklift dropped with the ramp and landed on its side. Habecker either fell out of or jumped from the forklift, ended up underneath and died.

B. Proceedings Below

After the accident, Plaintiffs instituted suit against Copperloy, the ramp manufacturer, Clark Equipment Company, the forklift manufacturer, and Forklifts, Inc., the company that had leased the forklift to the government and maintained it. Plaintiffs alleged that the ramp was defective because it failed to provide the decedent with adequate instructions on how to properly secure the ramp

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[5] In the first trial, the jury deliberated during the late afternoon of February 8, 1989, and the morning of February 9, reaching its verdict at 1:30 pm. In the second trial, the jury deliberated for 90 minutes (12:50 pm-2:20 pm). In the third trial, the jury deliberated for less than 90 minutes, starting at 2:50 pm, returning to court for additional instructions, and then reporting its verdict at 4:20 pm.

to the rear of a trailer and because it lacked an overload valve. Plaintiff also alleged that the forklift had been defectively designed because its throttle was prone to sticking and it lacked an operator restraint system (*e.g.*, seat belts).

1. *Habecker I*

During the first trial, the court granted a directed verdict in favor of Copperloy and a partial directed verdict for Clark and Forklifts on the throttle issue. The jury returned a verdict for Defendants on the operator restraint issue. App. 41a-42a. On appeal, the Third Circuit affirmed the directed verdicts, but reversed the judgment of the jury verdict holding that certain evidence proffered by one of Plaintiffs' experts, Dr. Brandt, had been improperly excluded by the court.[6] Although that expert's testimony was cumulative, the Third Circuit—using its harmless error standard—could "not say that the exclusion of Brandt's testimony is such that it is 'highly probable' that it did not affect plaintiffs' substantial rights." *Habecker v. Copperloy Corp.*, 893 F.2d 49, 53 (3d Cir. 1990) ("*Habecker I*") (App. 46a.).

2. *Habecker II*

In June 1990, the case went to trial for the second time.[7] The sole issue was whether the forklift was defective. This time Dr. Brandt testified fully on behalf of Plaintiffs. Again, the jury returned a verdict in favor of Defendants and again, the Court of Appeals reversed and remanded. *See Habecker v. Clark Equip. Co.*, 942 F.2d

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[6] App. 45a-46a. Ironically, on the eve of the third trial Plaintiffs sought to replace Dr. Brandt with another expert (App. 57a) because Brandt, a resident of Indiana, had been holding himself out as a licensed professional engineer when in fact he had no such license from the State of Indiana.

[7] Clark Equipment Co. and Forklifts, Inc. were the only defendants in the second trial and all subsequent proceedings.

210 (3d Cir. 1991) (*"Habecker II"*) (App. 25a-39a). The Third Circuit concluded that the trial court had incorrectly applied the "crashworthiness" doctrine. Although the Pennsylvania Supreme Court had never adopted the doctrine, the Court of Appeals speculated that it would adopt the doctrine, when faced with the issue. App. 31a. The Third Circuit held that under the doctrine the plaintiff must prove, among other things, that an alternative design, feasible in 1977, would have made the forklift safer when judged by all the available evidence through the time of trial. App. 34a.

3. *Habecker III*

In February 1993, the case went to trial for the third time. The district court scrupulously applied the crashworthiness doctrine as delineated in *Habecker II*. App. 53a-54a. Plaintiffs used the same experts they had used in *Habecker I* and *Habecker II*. One of those experts, relying on certain studies and reports, concluded on direct that ordinary lap belts would have, in his opinion, enhanced the safety of the forklift. During cross-examination, however, the expert was confronted with a series of studies and reports from academics, learned societies, and one state safety board, all of which demonstrated that lap belts would either have had no demonstrable effect or would have actually made the forklift less safe.

Defendants called Frank Entwisle, an engineer specializing in forklift design and safety, who testified that ordinary lap belts would not have provided a forklift operator with any added protection. On direct, Entwisle was asked if he had relied on any studies or reports to support his conclusion. Over Plaintiffs' objections, Entwisle discussed in chronological order the various studies, reports, and other materials that he had relied upon in reaching his conclusion that ordinary seat belts would not have improved forklift safety in this case. Those studies spanned almost two decades. For example, he dis-

cussed a study and review conducted in 1983 by the American Society of Mechanical Engineers which concluded that "the need or effectiveness of an operator restraint (lap belt) has not been established and there is concern that this restraint could introduce a new hazard." R. 2191A. He also indicated that he had relied on a series of public comments submitted by forklift operators to the State of California which had been considering—but ultimately declined—requiring lap belts in forklifts. Entwisle testified that those letters, all of which opposed the mandatory use of lap belts, were of a type relied on by engineers because "[a]ny engineer evaluating a design has to know what the users are going to do with their equipment and what they think about it." R. 1566A. Entwisle concluded that an ordinary lap belt would make the forklift less safe to operate, under the circumstances of this case.

On appeal, the Court of Appeals noted that, although Entwisle's testimony may have been offered to better enable the jury to evaluate the bases of his opinion, he should nevertheless not have been permitted to testify about the various studies underlying his opinion because, according to the Court of Appeals, such evidence is "unequivocally impermissible in a Pennsylvania products liability trial." App. 12a. The appeals court failed to note that the trial judge had given the jury a cautionary instruction concerning Entwisle's testimony. R. 2114A.

The Third Circuit reversed without conducting a harmless error analysis. Such an analysis, although performed in both *Habecker I* and *Habecker II*, may have been viewed as unnecessary by the Court of Appeals, given that the Third Circuit applies the same standard of review for harmless error in criminal cases and civil cases (*i.e.*, errors "are not harmless unless it is 'highly probable' that they did not affect a party's substantial rights"). *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924-27 (3d Cir. 1985).

REASONS FOR GRANTING THE WRIT

This case presents important unresolved questions about the role of the court of appeals in reviewing civil judgments and the relationship between the Federal Rules of Evidence and state substantive law. At issue is whether an appellate court may properly reverse a judgment on a jury verdict where there has been no finding that a technical error "more probably than not" affected the jury's verdict. Six circuits are evenly split on the appropriate appellate test for gauging the effect of an error on the jury's verdict. Also at issue is whether a federal appellate court may ignore the Federal Rules of Evidence in favor of an arguably conflicting aspect of a state's substantive law and whether, in so doing, it may vacate an otherwise sound verdict without finding an abuse of discretion. The circuits have been wrestling with this issue since the adoption of the Federal Rules of Evidence, and clarification by this Court would be appropriate.

I. THE COURT OF APPEALS' STANDARD OF APPELLATE REVIEW FUNDAMENTALLY CONFLICTS WITH THE HOLDINGS OF OTHER CIRCUITS AND UNDERMINES THE QUALITY OF APPELLATE DECISION-MAKING.

This Court has long held that " '[a litigant] is entitled to a fair trial but not a perfect one,' for there are no perfect trials." *Brown v. United States,* 411 U.S. 223, 231-232 (1973), *quoting Burton v. United States,* 391 U.S. 123, 135 (1968) and *Lutwak v. United States,* 344 U.S. 604, 619 (1953). Trials are costly to the litigants, to the courts, and to society in general. As such, most courts have long since abandoned the quest for perfection; appellate courts are no longer considered the "citadels of technicality." *Kotteakos v. United States,* 328 U.S. 750, 759 (1946). Although this Court and the Congress have sought to ensure that appellate courts "ignore errors that do not affect the essential fairness of the trial," the goal has proven to be elusive, in part because the statutory

standard is amorphous and subject to conflicting interpretations. *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. at 553. Specifically, 28 U.S.C. § 2111 provides that

> [o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.[8]

Although 28 U.S.C. § 2111 applies both to criminal and civil proceedings, this Court's effort has been devoted exclusively to refining the standard of review in criminal cases.[9] As a result, the courts of appeals have been left to their own devices in formulating the appropriate standard for civil review. Two conflicting views have emerged.

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[8] The language of the harmless error statute is reflected in Fed. R. Civ. P. 61 which provides that the "court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." While Rule 61 applies only to the district court, "it is well settled that the appellate courts should act in accordance with the statutory policy embodied in Rule 61." *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. at 554.

[9] For criminal cases, see *Brecht v. Abrahamson,* 113 S. Ct. 1710 (1993); *Arizona v. Fulminate,* 499 U.S. 279 (1991); *United States v. Lane,* 474 U.S. 438 (1986); *United States v. Hasting,* 461 U.S. 499 (1983); *Schneble v. Florida,* 405 U.S. 427 (1972); *Harrington v. California,* 395 U.S. 250 (1969); *Chapman v. California,* 386 U.S. 18, 24 (1967) (holding that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"); and *Kotteakos v. United States,* 328 U.S. at 764-65 (1946) (adopting, for non-constitutional errors, the "fair assurance" test). *Kotteakos'* "fair assurance" test and the "highly probable" test have been viewed as equivalent. *See United States v. Corey,* 566 F.2d 429, 432 (2d Cir. 1977); *Virgin Islands v. Toto,* 529 F.2d 278, 283-84 (3d Cir. 1976). For civil cases, see *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548 (1984) (discussing harmless error in civil cases, but not addressing the standard to be used by a reviewing court in determining whether an error was in fact harmless) and *Tipton v. Socony Mobil Oil Co.,* 375 U.S. 34 (1963).

In civil cases, the Eighth, Ninth, and Tenth Circuits have interpreted the harmless error statute in light of the normal civil burden of proof—more probable than not—and permit reversal only if the error more probably than not affected the outcome of the case. In contrast, the Third, Eleventh, and District of Columbia Circuits have opted to treat civil and criminal cases alike and have engrafted the far more "error averse" criminal standard onto the harmless error statute. In those circuits a civil judgment will only be affirmed if it is highly probable that the outcome had not been affected by the error.

As discussed below, the standard used makes a significant difference in appellate review. Treating civil and criminal cases alike needlessly increases retrials in civil cases and undermines the quality of appellate decision-making. Instead, the standard on appeal should reflect and complement the burden of proof used at the underlying trial.

A. The Nature of the Conflict Over the Meaning of Harmless Error.

The purpose of a harmless error standard is to enable an appellate court to gauge the likelihood that the trier of fact was improperly affected by the error. *See* Traynor, *supra,* at 29-30. On this all circuits agree, but that is where the agreement ends. The circuit conflict is sharp and explicit. It underscores a fundamental disagreement over the goals and nature of the appellate process and serves only to confirm what commentators have long maintained, namely that the history of harmless error has been marked by "chaos" and uncertainty. *See* Saltzburg, *supra,* at 998; Traynor, *supra,* at 13 (describing the history of harmless error as a "wayward course"). Not surprisingly, this history "cannot be described in terms of a consistent doctrine or an evolving progression of jurisprudential theories." [10] Saltzburg, *supra,* at 998. Simply

[10] The issue of harmless error has largely escaped the gloss of legal philosophers. The writings of Cardozo, Fuller, Hart, Schuman,

stated, the circuits have been unable to agree on even the most basic principles. For example, those circuits adhering to the "highly probable standard" seek trial court perfection and believe that a unitary standard—one that does not distinguish between criminal and civil cases—is the best way of achieving that goal. In contrast, those circuits that have adopted the "more probable than not" standard believe that perfection is not attainable and that the standard on review should reflect the nature of the fact-finding process below. These disparate views are best exemplified by the Third Circuit in *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916 (3d Cir. 1985) and the Ninth Circuit in *Haddad v. Lockheed California Corp.*, 720 F.2d 1454 (9th Cir. 1983).

The Ninth Circuit's standard sprang from the notion that "the most particular important factor to consider in fashioning such a standard is the nature of the fact-finding process to which the standard is to be applied." *Haddad v. Lockheed California Corp.*, 720 F.2d at 1459. Accordingly, the crucial first step in developing a harmless error standard, according to the *Haddad* court, is to recognize the distinction between civil and criminal trials. The lower burden of proof in civil cases implies that the margin of error acceptable to society in the civil case is greater than in the criminal. The lower burden of proof in a civil case also means that "a civil litigant merely has a right to a jury verdict that more probably than not corresponds to the truth." *Id.* Thus, in civil cases society is willing to accept a margin of error that approaches fifty percent. In contrast, society affords a criminal defendant a far greater degree of certainty—proof beyond a reasonable doubt.

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and Tullock appear to make no mention of it. *See* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); LON FULLER, LEGAL FICTIONS (1967); H.L.A. HART, THE CONCEPT OF LAW (1961); SAMUEL SCHUMAN, LEGAL POSITIVISM (1963); and GORDON TULLOCK, THE LOGIC OF THE LAW (1971).

The *Haddad* court went on to reason that a civil litigant's "lessened entitlement to veracity continues when the litigant becomes an appellant." *Id.* The court therefore concluded that a uniform standard—one that would govern appellate review for both criminal and civil cases—made little sense and that instead, the appellate standard "should reflect the burden of proof" used in the underlying trial. "In other words, when an appellate court ponders the probable effect of an error on a civil trial, it need only find that the jury's verdict is more probably than not untainted by the error." *Id.*

The Third Circuit in *McQueeney* expressly rejected the dual standard approach of *Haddad.* Instead, it argued "that perfection should still be our goal" and held that

> [t]here is no logical reason, however, that the tolerance for error in the civil context must be compounded by a less stringent standard of harmless error review. Society's tolerance for risk of error in civil cases may have been subsumed in the decision to establish a lower burden of proof in civil cases; further enlargement of the margin of error would therefore distort, rather than reflect, society's wishes.[11]

McQueeney v. Wilmington Trust Co., 779 F.2d at 926.

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[11] The Third Circuit embraced the uniform standard "[f]ollowing the lead of former [California] Chief Justice Roger Traynor." *McQueeney v. Wilmington Trust Co.,* 779 F.2d at 924. Traynor advocated the "highly probable" standard because he believed that it would better ensure that appellate courts direct their inquiry "at the crucial question: Did error affect the judgment?" Traynor, *supra,* at 49-50. Traynor was concerned that a different standard, *e.g.,* more probable than not, would obviate the need for a searching inquiry of the entire record. Ironically, however, Traynor's concerns were directed at criminal cases where society's tolerance of error is not great and where "[f]ailure to make [a searching appellate] inquiry [of the record] is particularly likely . . . ." *Id.* at 50. Thus, the "highly probable" rule was originally designed to promote perfection in criminal cases: "If appellate judges forthrightly opened the way to a new trial whenever a judgment was contaminated by error, there would be a cleansing effect on the

The Third Circuit's criticism of dual standards—each complementing the burden of proof used by the trial court—is simply incorrect. Using a "more probable than not" harmless error standard in civil cases will not "further enlarge . . . margin of error," as the Third Circuit predicted. *Id.* It will not, as a matter of pure mathematics, compound errors. Compounding of errors only occurs where the actions of the jury and that of the appellate court are independent events.[12] They are clearly not independent: the jury has seen the same trial that the appellate court has reviewed and has assessed the same evidence. Nor is there any evidence—empirical or anecdotal—to suggest that quality of review in the Eighth, Ninth, and Tenth Circuits has been adversely affected by their use of the "more probable than not" standard.

Dual standards ensure that jury verdicts are only disturbed where there is evidence that the jury would have reached a different verdict had the error not occurred. The "more probable than not" standard leads to reversal only in those cases where the effect of the error on the average jury's certainty of liability is sufficient to push that jury over the 50 percent threshold—the line that separates a defense verdict from a plaintiff's verdict. Thus, the "more probable than not" standard promotes, rather than undermines, the preponderance of the evidence standard. *See* Daniel Kornstein, *Bayesian Model of Harmless*

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trial process." *Id.* As such, Traynor provided no basis for his passing remark that in the "[l]ong run it would be much better to evolve a uniform test that could realistically govern errors of constitutional or nonconstitutional dimension, in both civil and criminal cases." *Id.* at 48. Rarely has a passing remark been adopted as a rule of law so readily by an appellate court.

[12] *See People v. Collins*, 438 P.2d 33, 36-39 (Cal. 1968) and Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1335-36 (1971) (both discussing the common fallacy of assuming that events are independent when in fact they are not); *see also* EMANUEL PARZEN, MODERN PROBABILITY THEORY AND ITS APPLICATIONS 87 (1960) (discussing the meaning of "independence" from a mathematical perspective).

Error, 5 J. LEGAL STUDIES 121, 131 (1976) (noting that from a probabilistic point of view, the appellate court standard must take into account the burden of proof).

B. The Implications of the Conflict for the Appellate Process.

Most commentators, including Justice Traynor, have recognized that there may be inherent problems in applying the "highly probable" standard to civil cases. In assessing the impact of an error on the jury's verdict, the most crucial factors are the "closeness" of the case, as tried with the error, and the magnitude of the error. Both must be considered in assessing the effect of the error on jury decision-making.[13] According to *Kotteakos v. United States*, 328 U.S. at 762, the question turns on "the relation of the error asserted to casting the balance for decision on the case as a whole." Thus, an appellate court "must take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened." *Id.* at 764. Where the case is close, even a relatively minor error may affect the outcome. In such cases, the appellate standard should lead to a reversal. Where the case, however, leans heavily in favor of the appellee, courts should be more willing to tolerate modest errors. Accordingly, if the magnitude of the error is held constant, the likelihood of reversal should decrease as the strength of the appellee's case increases.

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[13] A third factor frequently ignored by lower courts and commentators is the "bent" of the jury that actually heard the case. Yet, this is a crucial piece of information that must be factored into any harmless error analysis. "To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum." *Kotteakos v. United States*, 328 U.S. at 764. A jury verdict that is subject to appellate review has not been returned by the "average jury," but rather by a specific group of citizens. Whatever the appellate court's view of the evidence might be, we know that the jury believed the appellee's position was more correct than the appellant's position. This information should not be discarded in assessing whether an error affected the outcome of the jury's verdict.

Correspondingly, if the closeness of the case is held constant, the likelihood of reversal should increase as the magnitude of the error increases. The "more probable than not" standard, adopted by three circuits, achieves these results; the "highly probable" standard does not.

The "highly probable" standard blurs these distinctions and makes it less likely that an appellate court will consider both factors—the closeness of the case and the magnitude of the error—in tandem.[14] As the error grows in magnitude, an appellate court, acting under the highly probable standard, "will ordinarily reverse without weighing the evidence." Traynor, *supra,* at 58. There is an equal danger that a court may reverse without weighing either the error or the strength of the case as a whole. Indeed, this is precisely what occurred in *Habecker III.* As one would expect, the differences in the two appellate standards are so significant that they lead to measurable differences in the reversal rates across the circuits. In short, the standard that is used has a discernible effect on appellate court decision-making.

1. The Effect of Varying Standards Across Circuits.

Lawyers and judges are wordsmiths, and to them differences in phraseology, even if subtle, can be expected to affect the legal process. Nowhere is this more evident than with respect to burdens of proof. Research confirms that lawyers and judges draw sharp distinctions between the various burdens of proof. *See* Rita Simon and Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury and the Classroom,* 5 LAW & SOCIETY REV. 319 (1971); *United States v. Fatico,* 458 F. Supp. 338, 410 (E.D.N.Y. 1978), *cert. denied,* 444 U.S. 1073 (1980). Consequently, we would expect the rate of re-

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[14] Compare the court's perfunctory harmless error analysis in *Habecker I* (App. 46a), where the improperly excluded evidence was cumulative, with the Ninth Circuit's reasoned and careful review of the entire record in *Haddad.*

versal to be higher in those circuits using the "highly probable" standard than in those circuits using the "more probable than not" standard. Conversely, since all the circuits use a comparable standard in reviewing criminal cases, we would expect little difference in reversal rates for criminal cases across circuits and, further, the reversal rates for criminal and civil cases, where harmless error is at issue, should be similar in those circuits using a unitary standard.

A survey of harmless error cases, totalling 2,364 criminal and civil cases from January 1986 through November 1994, confirms these expectations.[15] Specifically, in the Third, Eleventh, and D.C. Circuits the combined civil reversal rate, where harmless error was at issue, is approximately 39 percent. In contrast, the combined reversal rate in the Eighth, Ninth, and Tenth Circuits is only 28 percent.[16] The difference between these two rates is statistically significant.[17] Thus, the circuits that use the "highly probable" standard are nearly 40 percent more likely to reverse a civil judgment than are the circuits that use the "more probable than not" standard. The reversal rates in criminal cases, where harmless error is at issue, is virtually identical for both groups of circuits—38 per-

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[15] The survey was conducted using WestLaw with the assistance of WestLaw's technical representative. All civil and criminal case decisions from the six circuits during the period January 1, 1986 through November 16, 1994 were separately searched and counted if harmless error was discussed by the court. The disposition of the case was determined by using the database's "synopsis" field.

[16] The most marked difference was between the Third and Ninth Circuits. In the Third Circuit, the civil reversal rate in harmless error cases is 42 percent as compared to only 26 percent in the Ninth Circuit. Thus, the Third Circuit is nearly 65 percent more likely to reverse than is the Ninth Circuit.

[17] $p<.0005$, $\chi^2=12.99$, 1 df. The chi-square (χ^2) test is a standard statistical test used to determine whether the difference between two or more sets of frequencies is statistically significant. *See* ALLEN L. EDWARDS, STATISTICAL METHODS 323-36 (2nd Ed. 1967).

cent. In short, the standard of review appears to have a predictable and significant impact on appellate decision-making.

2. The Effect of the "Highly Probable" Standard in *Habecker III*.

As in *Habecker I*, the instant case would have been resolved differently had the Third Circuit used the "more probable than not" standard. Judged by all objective criteria—including three successive jury verdicts in favor of Defendants—this was not a close case. Nor was the purported error unearthed by the appellate court significant. Here, Defendants' expert witness during direct examination explained to the jury the basis of his ultimate conclusions concerning the effectiveness of ordinary lap seat belts. Inasmuch as he had relied on numerous studies and reports which spanned two decades, he discussed each of these with the jury. The Court of Appeals, relying on Pennsylvania substantive law, found that it was improper for the expert to have discussed these reports because they tended to focus attention away from the product and on to what Defendants knew. App. 12a. Since safety was to be judged by the state of affairs at the time of trial, the court apparently believed that the reports underlying the expert's opinion—especially the older studies—were irrelevant.

The Court of Appeals reversed without conducting a harmless error analysis. Given that the Third Circuit's review standard—the one used in *Habecker I* and *Habecker II*—is so rigid that it can result in a virtual automatic reversal, the lack of such an analysis is understandable. This Court however has repeatedly held that appellate courts must undertake a comprehensive harmless error analysis, based on the entire record. *See United States v. Hasting*, 461 U.S. at 509 (passing reference to "harmless-error" doctrine, without applying it, is not sufficient). Had the Third Circuit heeded this Court's admonition to undertake such an analysis and applied the Ninth

Circuit's "more probable than not" standard, it would have affirmed for a variety of reasons.

First, as noted above, this was not a close case: the evidence overwhelmingly favored Defendants. Second, the error, such as it was, was highly technical and went to the basis of the expert's opinion and not his conclusions. Third, during direct examination, Plaintiffs' own expert relied on precisely the same types of studies and reports deemed inadmissible by the Court of Appeals. R. 1136A-1137A. And finally, the judge, at the request of Plaintiffs, provided the jury with a cautionary instruction concerning how they were to determine the safety of the alternate design.

Here, the Third Circuit's avowed "quest for perfection" through its use of the "highly probable" standard has transformed a mundane products liability case into a never ending series of trials and retrials.

C. The Time Is Ripe for This Court To Resolve the Conflict and To Provide Guidance on the Harmless Error Doctrine in Civil Cases.

The circuit conflict over harmless error, with its profound impact on the ultimate outcome of thousands of civil cases in the federal appellate courts, will not be resolved on its own. The inter-circuit dispute has sharpened, positions have hardened, and grounds for reconciliation have all but vanished. No case could present a more compelling vehicle for resolving the conflict than the instant one; it has already been tried three times and the parties are currently awaiting a fourth trial. Quite aside from the interests of the parties here, acting now could prevent wasteful retrials in scores of other cases and ensure that the appellate courts do not again become "citadels of technicality."

Despite the sharpening of the dispute between, most notably, the Third, Eleventh, and D.C. Circuits on the

one hand, and the Eighth, Ninth, and Tenth Circuits, on the other hand, the remaining circuits are still on the fence. To the extent that other circuits decide to join the Third Circuit's view, even more cases will be precipitously reversed on appeal, thus creating unnecessary, excessive, and costly retrials. This Court has devoted considerable effort to refining the harmless error standard in criminal cases. Given the vibrant inter-circuit conflict—involving six circuits evenly split between two irreconcilable positions—and the fact that the number of harmless error cases has been increasing over the past three decades, the time is ripe for the issue to be resolved by this Court.

II. THE PETITION SHOULD BE GRANTED TO DETERMINE WHETHER EXPERT TESTIMONY IS GOVERNED BY THE FEDERAL RULES OF EVIDENCE OR, AS THE COURT OF APPEALS HAS HELD, BY STATE SUBSTANTIVE LAW.

It is by now axiomatic that in diversity cases, the Constitution authorizes Congress to displace state law with a federal rule. Thus, any act of Congress purporting to prescribe procedure for diversity cases is a valid exercise of Congress' power to regulate the federal judicial system. *See Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825). In that regard, the Federal Rules of Evidence are an apt example of a congressional act that occupies the field without limitation and takes precedence over conflicting state law, whether substantive or procedural.[18] The Federal Rules of Evidence were expressly designed to provide uniformity within federal *fora* and to apply equally to all district courts and courts of appeals in "civil actions and proceedings. . . ." Fed. R. Evid. 1101(b).

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[18] In contrast, the Federal Rules of Civil Procedure were adopted by the courts pursuant to the Rules Enabling Act of 1934 and are valid only to the extent that they do not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072; *see Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

The Court of Appeals in the instant case ignored the clear purpose and language of the Federal Rules in favor of its guess as to the substantive law of Pennsylvania. This restrictive view of the Federal Rules is simply incorrect. It illustrates, however, the difficulty that courts have had in establishing the metes and bounds of the Federal Rules, especially where the application of a state substantive law conflicts with dictates of the Federal Rules. Nowhere is this difficulty more apparent than in cases involving expert witnesses and scientific evidence, where the Federal Rules are considerably more liberal than the common law rules preceding them. Thus, this case provides the Court with an important opportunity to clarify the relationship between state substantive laws and the Federal Rules of Evidence.

A. The Court's Holding Violates the Plain Language of the Federal Rules of Evidence and Fundamentally Conflicts With the Holdings of This Court in *Daubert v. Merrell Dow Pharmaceuticals* and of Other Circuits.

The Court of Appeals ruling in *Habecker III* (App. 1a-24a) is inconsistent with rulings of other circuits and of this Court to the effect that the "[r]ules supersede the rules of evidence based on common-law principles," and that "courts are not free to establish rules of evidence independent of the Federal Rules." *United States v. Grajeda*, 570 F.2d 872, 874 (9th Cir.) (Kennedy, J.), *withdrawn and new opinion issued on alternate ground*, 587 F.2d 1017 (9th Cir. 1978). "The Rules occupy the field . . . ." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. at 2794 (1993). This is especially the case where expert testimony is involved. Common law notions must give way to the language of the Federal Rules. *Id.*

The Federal Rules of Evidence allow an expert to testify about scientific, technical, or other specialized "knowledge" if that knowledge will assist the trier of fact

to understand the evidence. Fed. R. Evid. 702. The Rules therefore contemplate that experts will not merely give an ultimate conclusion, but rather will share with the jury the basis of that conclusion. *See* Fed. R. Evid. 703 and 705. As this Court emphasized:

> [I]n order to qualify as "scientific knowledge" an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific [or technical] knowledge" establishes a standard of evidentiary reliability.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. at 2795.

This Court's emphasis on knowledge, as opposed to bare conclusions, is not only consistent with the plain reading of the Federal Rules, but also with studies of how juries process information. In particular, reasoned jury decision-making is promoted when the expert is permitted to explain the bases of his or her opinion. *See* Brian L. Cutler, Steven D. Penrod & Hedy R. Dexter, *The Eyewitness, the Expert Psychologist, and the Jury*, 13 LAW & HUM. BEHAV. 311, 325 (1989) (suggesting that quality of jury reasoning improves where experts are permitted to discuss the bases of their opinion as opposed to merely rendering a conclusion without empirical support). Accordingly, in *Daubert*, this Court placed great weight on such factors as whether the expert's opinion was supported by empirical data, whether the expert's views were generally accepted in the scientific community, and whether those views had been published in the peer reviewed literature. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. at 2796-97. Indeed, based on *Daubert*, trial and appellate courts have excluded expert conclusions that lacked these indicia of reliability. *See Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607 (7th

Cir. 1993) (affirming exclusion of evidence not well-grounded in scientific method); *Chikovsky v. Ortho Pharmaceutical Corp.*, 832 F. Supp. 341 (S.D. Fla. 1993).

The Court of Appeals in *Habecker III*, out of deference to Pennsylvania's substantive law, ruled that while Mr. Entwisle, Clark's engineering expert, could testify about his ultimate conclusion, he could not testify about the bases of that conclusion. App. 15a. Thus, under one reading of the court's opinion, Entwisle should not have been permitted to testify about the findings of learned societies, the published works of academic researchers, or other factors that engineers would normally rely upon in drawing conclusions. Each of these factors is relevant and expressly admissible under *Daubert*.

B. The Court of Appeals' Ruling Is Symptomatic of the Difficulties That Courts Have Had in Resolving Conflicts Between the Federal Rules of Evidence and State Substantive Law.

The very fact that the Court of Appeals reached a conclusion that is so out of step with accepted legal thought underscores the difficulties that courts have had in reconciling the Federal Rules of Evidence with state substantive law when the two conflict. Although the federal courts have been struggling with this issue for nearly two decades, no clear resolution has emerged. As Judge Swygert aptly noted, "The question whether the admissibility of the disputed evidence is governed by state or federal law is a difficult one." *Oberst v. International Harvester Co., Inc.*, 640 F.2d 863, 867 n.2 (7th Cir. 1980) (Swygert, J., dissenting); *see Barron v. Ford Motor Co. of Canada, Ltd.*, 965 F.2d 195 (7th Cir.) (Posner, J.), *cert. denied*, 113 S. Ct. 605 (1992).

Part of the difficulty that courts have had in attempting to accommodate conflicting provisions of the Federal Rules and state law is traceable, in part, to the fact there is no set of common principles agreeable to all. Indeed, there is even doubt as to whether any such conflict would

be subject to an *Erie* analysis. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *see* Olin G. Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371 (1977) (noting the complex issues inherent in the decision whether to follow federal or state law). This lack of a common paradigmatic thread has led the courts of appeals to reach conflicting decisions in virtually identical cases. For example, in *Rovegno v. Geppert Bros., Inc.*, 677 F.2d 327 (3d Cir. 1982), the court was asked to resolve whether in an automobile accident diversity case, the plaintiff's blood alcohol level should be admitted to show contributory negligence. The trial court excluded the evidence. A divided panel of the Third Circuit affirmed, assuming that *Erie R.R. v. Tompkins* required that Pennsylvania's substantive law take precedence over the Federal Rules. In contrast, the Fifth and Seventh Circuits, when faced with identical fact patterns, both held that the Federal Rules govern the admissibility of such evidence, notwithstanding state substantive law to the contrary. *See Ballou v. Henri Studios, Inc.*, 656 F.2d 1147 (5th Cir. 1981); *Levitt v. H.J. Jeffries, Inc.*, 517 F.2d 523 (7th Cir. 1975) (holding that under Fed. R. Civ. P. 43(a) and using the then-proposed Fed. R. Evid. 401 as a guide, federal law mandates the admission of evidence of intoxication prior to an accident).

C. The Doctrinal Vacuum Underscores the Need for This Court To Provide Appropriate Guidance.

Diversity cases have traditionally raised complex issues over the relationship between state and federal law. The Federal Rules of Evidence, while providing national uniformity, have greatly increased this complexity if for no other reason than that resolution of conflicts between state law and the Federal Rules are not necessarily amenable to a traditional *Erie* analysis. Lacking a set of well-established principles to aid in resolving these conflicts,

the courts of appeals have frequently thrown up their hands in despair.

The uncertainty associated with this doctrinal vacuum will likely grow as the number of diversity cases increases. Petitioners submit that the time is appropriate for this Court to provide the needed guidance.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

Of Counsel:

DAVID C. FIELD
CLARK MATERIAL HANDLING COMPANY
333 West Vine Street
Lexington, KY 40507
(606) 288-1216

STANLEY V. BOYCHUCK
SWANSON, MARTIN & BELL
One IBM Plaza
Chicago, IL 60611
(312) 321-9100

RICHARD W. HOLLSTEIN
THOMAS J. COLE
CLARK, LADNER, FORETENBAUGH & YOUNG
2005 Commerce Square-21st Floor
Philadelphia, PA 19103
(215) 241-1800

JOHN A. STATLER
GOLDBERG, KATZMAN & SHIPMAN, P.C.
320 Market Street
Strawberry Square
P.O. Box 1268
Harrisburg, PA 17108-1268
(717) 234-4161

VICTOR E. SCHWARTZ *
ROBERT P. CHARROW
JOSEPH N. ONEK
LISA A. PRICE
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2500
Attorneys for the Petitioners

* *Counsel of Record*

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 93-7177

CONNIE L. HABECKER, Individually and as Personal Representative of the Estate of JOHN R. HABECKER, Deceased; JOHN MICHAEL HABECKER, Minor, by CONNIE L. HABECKER, his Parent, Natural Guardian and Next Friend,

Appellants,

v.

CLARK EQUIPMENT COMPANY; FORKLIFTS, INC.

Argued Jan. 25, 1994

Decided Sept. 16, 1994

Before: MANSMANN, NYGAARD and SEITZ, Circuit Judges.

OPINION OF THE CIRCUIT

MANSMANN, Circuit Judge.

We are revisiting this products liability case after a third trial on the alleged defectiveness of a forklift for its manufacturer's failure to equip it with an operator restraint system. We focus specifically on issues related to the forklift's crashworthiness under Pennsylvania law. Our task is to determine whether the district court's evidentiary rulings, permitting evidence proffered by the defendant-manufacturer pertaining to its lack of knowledge of such devices at the time of the sale, the state of the art, and the desirability of such restraints as viewed

by the industry, were consistent with Pennsylvania's crashworthiness law and its public policy which underlies it.

I.

John Habecker was a civilian employee of the New Cumberland Army Depot when the forklift he was backing down a ramp tumbled from the side of the ramp. Thrown from the forklift, Habecker was tragically killed when the forklift fell on top of him. The forklift was manufactured in 1977 by Clark Equipment Company and was not designed with an operator restraint system (ORS), nor had one subsequently been installed.

Habecker's estate and family[3] ("Habecker") brought a products liability action in the United States District Court for the Middle District of Pennsylvania against Clark and Forklifts, Inc., the corporation that leased the forklift to the Army, alleging that the forklift was defective due to the lack of an ORS, for example, a seat belt.[2] After trial, the jury returned a verdict for the defendants.

On appeal, we reversed and remanded for a new trial on the operator restraint issue, reasoning that the district court erred in refusing to permit Raymond Brandt to tes-

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[1] Habecker's wife, Connie L. Habecker, brought this suit individually and as personal representative of his estate, as well as on behalf of Habecker's son, John Michael, as parent, natural guardian and next friend.

[2] Originally suit was also brought against Copperloy Corporation, the maker of the ramp, and the claims against all parties included strict liability, breach of implied warranty and negligence. The implied warranty and negligence claims were dismissed prior to the first trial. The strict liability theories were based on alleged defects in both the forklift and the ramp. Habecker submitted that the forklift was defective because it had a sticking throttle and had not been designed with an ORS. The ramp was allegedly defective because it lacked adequate instructions on how to properly secure it and because it did not have an overload relief valve that would keep it from overturning.

tify as an expert for the plaintiffs. *Habecker v. Copperloy Corp.*, 893 F.2d 49, 52-53 (3d Cir.1990) (*Habecker I*).[3]

In that appeal, Habecker had also argued that the district court erred by continually admitting, over objections, extensive testimony and evidence about industry standards, government regulations, and other "state of the art" matters concerning operator restraints, asserting that such evidence was inadmissible in a products liability suit governed by Pennsylvania law. We found it unnecessary to address this issue because the case had to be retried. Nonetheless, we stated: "The district court has recognized the problem, and we are confident that it will carefully limit the admissibility of such evidence on re-trial." *Id.* at 53.

Finally, Habecker argued that the district court, in eliminating the retrofit issue, also dismissed the issue of failure to give a post-sale warning. We expressly held that the district court only eliminated the failure-to-retrofit issue, not the failure-to-give-a-post-sale-warning issue. *Id.* at 54.

On retrial, the district court permitted Clark to offer evidence relating to its theory of the effectiveness of ORSs in 1977, demonstrating that the industry had been unable to determine whether ORSs reduced the risk of serious injury to the operator and that it was only later, after the development of more sophisticated computer modeling, that the industry decided it was *desirable* to equip forklifts with such systems. Clark argued that as of 1977 a manufacturer could not have known whether ORSs created more risks than they eliminated. Once again the jury returned a verdict for the defendants.

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[3] Additionally, we affirmed the district court's grant of a directed verdict in favor of Copperloy for lack of a substantial factor supporting causation, and we affirmed the court's grant of a partial directed verdict in favor of Clark and Forklifts on the defective throttle issue.

On appeal, in *Habecker v. Clark Equipment Co.*, 942 F.2d 210 (3d Cir.1991) (*Habecker II*), we distinguished evidence of what safety measures were *feasible* at the time a product was designed and evidence of what safety measures were known to be *desirable* at that time. Noting that this case was one of crashworthiness, we held that "[l]iability is imposed on a manufacturer in a case for a design defect because an alternative, *feasible,* safer design would have lessened or eliminated the injury plaintiff suffered." *Id.* at 215. We concluded that:

> "[i]f no such alternative *feasible* design existed when the product was manufactured, then the design cannot be said to be 'defective,' even if more recent technology has rendered a safer design *feasible.* Therefore, the factfinder can only determine whether a particular design was defective after hearing evidence about what designs were *feasible* at the time the product was manufactured and whether they were in fact safer."

Id. We excluded, consistent with Pennsylvania law, any evidence of what was or was not known about the *desirability* of ORSs in 1977.

> [T]he only question for the jury was whether an operator restraint system is an "element necessary to make [a forklift] safe for its intended use," *Azzarello,* [*v. Black Brothers Co.*, 480 Pa. 547] 391 A.2d [1020] at 1027, (1978) a question that is to be answered on the basis of all the knowledge available at the time of trial. Evidence about what Clark knew or could have known about the desirability of operator restraint systems at the time of manufacture is not relevant to that question.

Id. at 216. We found that there was a substantial possibility that the inadmissible evidence influenced the jury's determination, focusing its attention on Clark's behavior and decision-makng rather than on the product's defectiveness.

Finally, we held that the district court took a narrow view of its own authority on remand. While the parties were preparing for the second trial, the district court issued an order stating that pursuant to our opinion in *Habecker I*, the only issue for re-trial was whether the forklift was defective when it left Clark, the manufacturer, in 1977. The district court held that the parties would be confined to presenting evidence only through the witnesses listed in their original pre-trial memorandum. The order prevented Habecker from further discovery and from raising new theories of liability. We stated that it was not our intention to so restrain the second trial, and although we expressed no view on the direction the district court should take, we held only that the decisions on whether to allow new claims, whether to permit further discovery, and whether to hear additional evidence were all within the district court's discretion.

On remand for the third trial, but prior to it, Habecker filed a motion to exclude all state of the art evidence as well as letters and studies purporting to show the dangers of ORSs in forklift turnovers. There was extensive discussion on this issue in chambers at the pretrial conference on January 29, 1993. Clark argued that *Habecker II* permitted evidence of feasibility in a crashworthiness case, *i.e.*, that if Habecker offered the 1983 ORS as an "alternative, safer design, practicable under the circumstances," *Habecker II* at 214; *see also Kupetz* at 1218, then defense evidence of its feasibility in 1977 would become relevant. The district court granted Habecker's motion, but in consideration thereof, limited Habecker to general evidence about ORSs—excluding any evidence about the 1983 ORS. 631A.

Further, the district court permitted, over strenuous and continuous objections, defense testimony about user letters and concerns pertaining to ORSs, engineering concerns, and concerns of various corporations, committees and societies, all of which impact the knowledge available to Clark regarding the ORSs' desirability. The jury re-

turned a defense verdict, and Habecker now appeals once more.

II.

A.

Since the adoption of Section 402A of the Restatement (Second) of Torts,[4] the Pennsylvania Supreme Court has remained faithful to its view that negligence concepts have no place in a products liability trial. *See Lewis v. Coffing Hoist Div., Duff-Norton*, 515 Pa. 334, 528 A.2d 590, 593 (1987).[5] The test for defectiveness is whether the "product left the supplier's control lacking any element

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[4] (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Webb v. Zern, 422 Pa. 424, 220 A.2d 853, 854 (1966) (quoting Restatement (Second) of Torts § 402A (1965)).

[5] In *Lewis* the Court also endorsed our opinion in *Holloway v. J.B. Systems, Ltd.*, 609 F.2d 1069 (3d Cir.1979) (holding that it was inappropriate to admit evidence of industry standards and practices in a products liability trial). *Lewis*, 528 A.2d at 594. *See also Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020, 1027 (1978) (holding that the term "unreasonably dangerous" has no place in the instructions to the jury in a products liability case); *McCown v. International Harvester Co.*, 463 Pa. 13, 342 A.2d 381 (1975) (rejecting contributory negligence as a defense to actions grounded in products liability); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975) (holding that, for policy reasons, a manufacturer should be the guarantor of its products' safety, reasoning that the distinction between strict liability and negligence is that the exercise of due care in strict liability cases is absolutely irrelevant).

necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020, 1027 (1978). "[I]t is the product itself which is on trial, and not the manufacturer's conduct." *Lewis*, 528 A.2d at 593. In Lewis, a case concerning the defectiveness of a control box for a hoist, the Pennsylvania Supreme Court held:

> Having reached the conclusion that evidence of industry standards relating to the design of the control pendent involved in this case, and evidence of its widespread use in the industry, go to the reasonableness of the appellant's conduct in making its design choice, we further conclude that such evidence would have improperly brought into the case concepts of negligence law. We also conclude that such evidence would have created a strong likelihood of diverting the jury's attention from the appellant's control box to the reasonableness of the appellant's conduct in choosing its design. For those reasons we conclude that the trial court correctly ruled the evidence to be irrelevant and hence inadmissible. It is well established that a trial court should exclude evidence which has a tendency to distract the jury from its main inquiry or confuse the issue.

Id. 528 A.2d at 594. For a general discussion of the development of products liability law in Pennsylvania see *Dillinger v. Caterpillar Inc.*, 959 F.2d 430, 435-37 (3d Cir.1992).

B.

The parties agree that this case focuses on the crashworthiness of the Forklift. In *Habecker II* we noted that although the Pennsylvania Supreme Court had yet to adopt the crashworthiness doctrine for products liability cases, we had previously predicted that it would adopt it. *Habecker II*, 942 F.2d at 214 (citing *Roe v. Deere &*

Co., 855 F.2d 151, 153 n. 2 (3d Cir.1988)). We explained that "[u]nder the doctrine of crashworthiness, the manufacturer's liability for producing defectively designed products includes the liability for failing to provide safety features and liability for providing inadequate safety features.[6] *Habecker II*, at 213. In other words, the crashworthiness doctrine imposes liability on the manufacturer not for causing the accident, but rather for failing to minimize the injuries or even increasing the severity of the injuries sustained in an accident brought about by a cause other than the alleged defect. We further discussed our previous decision in *Huddell v. Levin*, 537 F.2d 726 (3d Cir.1976), where we predicted that the New Jersey Supreme Court would adopt the crashworthiness doctrine and set forth the criteria required for a prima facie case.[7]

We viewed our task in *Habecker II* as predicting the definition the Pennsylvania Supreme Court would give the crashworthiness doctrine and specifically, what evidence it would find relevant in determining liability. *Id.* We distinguished between evidence of feasibility and evidence of desirability, although we did not expressly predict the adoption of the *Huddell* criteria for Pennsylvania law. Recently the Pennsylvania Superior Court issued an opinion expressly recognizing the crashworthiness doctrine as a theory of recovery in Pennsylvania and requiring the establishment of the same criteria we set forth in *Huddell* for a successful crashworthiness case. *Kupetz v. Deere*

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[6] The theory of products liability is applied to three types of defects: design, manufacturing, and marketing (warnings). The crashworthiness doctrine implicates the overtures of design defects.

[7] There we held that the plaintiff must establish (1) that the design in question was defective, offering proof of an alternative, safer design, practicable under the circumstances; (2) what injuries, if any, would have resulted had the alternative, safer design been used; and (3) the extent of enhanced injuries attributable to the defective design. *Habecker II*, at 214 (quoting *Huddell v. Levin*, 537 F.2d 726, 737-38 (3d Cir.1976)).

and Co., 644 A.2d 1213 (Pa.Superior 1994).[8] In *Kupetz* the Superior Court stated:

> The principle behind the "second collision" concept is that, because the way the vehicle has been manufactured, a person's injuries have been aggravated unnecessarily; and such a concept has equal applicability, whether the person's second collision is with the interior of the vehicle or the exterior ground.
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> The effect of the crashworthiness doctrine is that a manufacturer has a legal duty to design and manufacture its product to be reasonably crashworthy. In terms of strict product liability, this means that a manufacturer has to include accidents among the "intended" uses of its product. A manufacturer who fails to fulfill this legal duty will be liable to the passenger of a car whose injuries are increased due to the design defect in the automobile. Liability will attach even though the defect in manufacture or design did not cause the initial acident or impact.

Id. at 1218 (citations omitted).[9]

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[8] Shortly after the adoption of § 402A in *Webb*, the Pennsylvania Supreme Court held that "lack of proper safety devices can constitute a defective design for which there may be recovery." *Bartkewich v. Billinger*, 432 Pa. 351, 247 A.2d 603, 605 (1968). Further, in *McCown v. International Harvester Co.*, 463 Pa. 13, 342 A.2d 381 (1975), the Court recognized that in a products liability action the defect itself did not have to be the cause of the accident. McCown was permitted to recover where the defect was not the cause of the collision, but did cause his injuries. These cases provided the basis for the Superior Court's determination that the Pennsylvania Supreme Court has implicitly adopted the crashworthiness doctrine. *Kupetz* at 1218.

[9] We note that for the elements of the crashworthiness doctrine, *Kupetz* cited *Dorsett v. American Isuzu Motors, Inc.*, 805 F.Supp. 1212, 1218 (E.D.Pa.1992), which cited *Habecker II* and *Huddell* for the same language. It also cited *Craigie v. General Motors Corp.*, 740 F.Supp. 353, 356-57 (E.D.Pa.), in which the court analyzed *Huddell*.

A products liability cause of action in Pennsylvania has three requirements; it must be shown that: (1) the product was defective, (2) the defect existed while the product was in the control of the manufacturer, and (3) the defect was the proximate cause of the injuries. *Walton v. Avco Corp.*, 530 Pa. 568, 610 A.2d 454, 458-59 (1992). The Superior Court in *Kupetz*, however, explained that to establish a cause of action on a crashworthiness theory, a subset of a products liability action, it must be shown: (1) that the design of the vehicle was defective; (2) that when the design was made, an alternative, safer design, *practicable under the circumstances* existed; (3) what injuries, if any, the plaintiff would have received had the alternative, safer design, been used; and (4) what injuries were attributable to the defective design. We predict that the Pennsylvania Supreme Court will adopt the view set forth in *Huddell* and then subsequently by the Superior Court in *Kupetz*. As we have already held in *Habecker II* that this is a crashworthiness case, we must analyze the district court's conduct of the trial pursuant to the analysis set forth in *Kupetz*.[10]

III.

A.

Habecker argues that the district court erred in permitting defense testimony regarding the knowledge available to Clark at the time of the forklift's design about the desirability of ORSs. A corollary is Habecker's argument that the district court erred in forcing her to elect whether to refrain from offering any evidence about the 1983 ORS or to admit it and "open the door" for Clark to counter with evidence concerning the state of the art, industry standards, its conduct in the development of the 1983 sys-

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[10] The record establishes that the district court conducted the second trial as a crashworthiness case, pursuant to the elements set forth first in *Huddell* and then in *Habecker II*.

tem, and why the 1983 ORS was not feasible in 1977.[11] 635A-36A. We review these decisions for abuse of discretion, but to the extent the district court's rulings were predicated on an erroneous interpretation of law, our review is plenary. *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238, 257 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Clark had created two safety videos depicting the breakthrough in technology that enabled it to design the 1983 ORS, and demonstrating the system's superiority. The target audience was forklift drivers in general, and the videos described what to do in the event of a rollover accident. During trial Habecker attempted to offer the Clark videos as evidence in rebuttal to Frank Entwisle's testimony, but was not permitted to do so (1729a). Entwisle's testmiony included, *inter alia*, the contents of the user letters, concerns, and objections to seat belts, and the California Department of Industrial Relations' decision not to require an ORS on forklifts (1562a-71a). He also testified about the concerns engineers had in deciding whether to put on a seat belt (1575a-86a); that in 1977 there was no literature or scientific studies available which indicated seat belts were safer (1578a); the opinion and concerns of the American Society of Mechanical Engineers (1589a-94a); that General Motors had opinions against seat belts (1607a); and the lack of a recommendation for an ORS in the National Safety Council Manual in effect during 1977 (1645a-46a). Additionally, Entwisle testified that in 1977 there was no acceptable ORS

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[11] **The 1983 ORS was invented in 1983 and then patented in 1986. It was allegedly not apparent until 1983, with the advent of proper computer technology, that Clark was able to determine that some type of ORS was safer than nothing at all. The evidence at the second trial suggested that as of 1977, Clark could not have known whether an ORS created more risks than it eliminated. *Habecker II*, at 213. We held in *Habecker II* that it was irrelevant to the issue of defectiveness *when* the industry determined that placing an ORS on a forklift was more desirable than not.**

that could be put on a forklift because the 1983 ORS was not patented until 1986 (1591a, 1595a, 1603a-1604a).

Clark argues that the purpose of Entwisle's testimony was to clarify that operator restraint systems similar to the 1983 ORS did not exist in 1977 (1514a-15a). This argument, Habecker contends, despite Clark's admission of feasibility,[12] is unequivocally impermissible in a Pennsylvania products liability trial. We agree. Clark insists that Habecker misrepresents the record when it states that this information was offered to show knowledge, conduct, desirability or state-of-the-art.[13] Habecker argues that the evidence Clark introduced is precisely what *Habecker II* held to be improper, that Clark's evidence is inadmissible and improperly focuses the jury's attention on Clark's conduct, rather than on the forklift itself. Again, we agree.

Clark contends that there is a qualitative difference between one type of ORS (automotive seat belt and wing) and another (the 1983 ORS). Clark has consistently argued throughout this litigation that while the automotive seat belt and some type of wing design was feasible in 1977, it was not safer. Conversely, the 1983 ORS design was not feasible in 1977, although it may be safer in some circumstances. According to Clark, our

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[12] We noted in *Habecker II* that Clark conceded that *an* ORS would have been feasible in 1977 (261a). Clark interprets its "admission" of feasibility at the second trial, that seat belts and wings could be placed on a forklift, not to constitute an admission of the feasibility of all other particular ORS designs. The district court, in a thorough opinion, ruled that the defendant had only admitted the feasibility of a seat belt and some type of wing (423a). Habecker argues that the district court's interpretation of Clark's admission constitutes reversible error. We note that in *Habecker II* we held that Clark had conceded that *an* ORS was feasible in 1977. We must affirm the district court's decision here absent an abuse of discretion. We see no abuse here.

[13] Clark insists the testimony was offered so that the jury would be able to evaluate the opinion of Mr. Entwisle based upon those studies which existed and which formed the basis of his opinion.

result denies it a jury trial because it forces the jury to treat differing types of ORSs identically. It is essentially deprived of presenting the feasibility of its ORS to the jury.

Clark forcefully argues that design evolution and the question of feasibility are linked together in that, over time, safety features are invented. Clark opines that it is common knowledge that the first design of a product may be altered and improved drastically over the years as new technologies are incorporated. Although the design of the Model T was feasible 60 years ago, current automobile designs were not; for example, air bags and anti-lock brakes are recent safety improvements.

B.

In Pennsylvania the arguments Clark propounds are irrelevant. Pennsylvania's public policy is such that manufacturers of products are encouraged to make them as safe as possible, as soon as possible. In *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020, 1024 (1978), the Pennsylvania Supreme Court stated that the supplier of a product is the guarantor of its safety. In that regard, evidence of Clark's conduct is absolutely irrelevant. The forklift is on trial here, *Lewis v. Coffing Hoist Div., Duff-Norton*, 515 Pa. 334, 528 A.2d 590, 593 (1987); nothing Clark did or knew in its decision making capacity or design choice is relevant to that inquiry.[14]

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[14] Pennsylvania is not alone in emphasizing the safety of the product, rather than the manufacturer's conduct, in design defect cases. *See, e.g., Barker v. Lull Eng'g Co.*, 20 Cal.3d 413, 143 Cal. Rptr. 225, 229, 573 P.2d 443, 447 (1978) (emphasizing its "continued adherence to the principle that, in a product liability action, the trier of fact must focus on the *product*, not on the manufacturer's *conduct*"); *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 463 N.Y.S.2d 398, 401, 450 N.E.2d 204, 207 (1983) (stating that in a design defect case, "[t]he focus shifts from the conduct of the manufacturer to whether the product, as designed, was not

In *Habecker II* we distinguished between feasibility and desirability. *Feasibility* means: 1) capable of being done, executed, or effected; possible of realization; 2) capable of being managed, utilized, or dealt with successfully. *Webster's Third New International Dictionary of the English Language Unabridged. Desirability* means the quality, fact, or degree of being desirable or having worth,

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reasonably safe. . . . A manufacturer is held liable regardless of his lack of actual knowledge of the condition of the product").

Other states disagree. *See, e.g., Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 365 N.W.2d 176, 184 (1984) (stating that "[a]lthough many courts have insisted that the risk-utility tests they are applying are not negligence tests because their focus is on the product rather than the manufacturer's conduct, . . . the distinction on closer examination appears to be nothing more than semantic. . . . The underlying negligence calculus is inescapable"); *Feldman v. Lederle Lab.*, 97 N.J. 429, 479 A.2d 374, 385 (1984) (stating that "[w]hen the strict liability defect consists of an improper design . . . reasonableness of the defendant's conduct is a factor in determining liability"). *See also Lewis v. Coffing Hoist Div., Duff-Norton*, 515 Pa. 334, 528 A.2d 590, 593-94 (1987).

The rationale for strict liability was originally adopted for defective products, that is, products that were not as the manufacturer intended. Manufacturers were deemed to be in the best position to provide "insurance" against accidents by spreading the cost of accidents among all consumers of the product. The theory concludes that manufacturers would self-impose the most efficient level of care if they were held liable for defects. Restatement (Second) of Torts § 402A cmts. a-d.(1965). Furthermore, manufacturers have better access to information about their manufacturing processes. Thus, the theory maintains that it is sensible to require manufacturers to come forward with this information.

This rationale is not on all fours with design defects, where the product is as the manufacturer intended. *See, e.g., Prentis*, 365 N.W.2d at 185 (discussing the incompatibility of strict liability and design defects). For example, cost spreading is not effective when the entire product line is defective and every consumer is equally at risk, and further the rules of discovery detract from the information-access argument. We acknowledge, however, that a strict liability regime, as opposed to negligence, does provide manufacturers with added incentive to design their products with care.

and *desirable* means worth seeking or doing as advantageous, beneficial or wise, *Id.* We acknowledge the district court's strenuous effort to attempt to follow our mandate from *Habecker II.* The line between feasibility and desirability is certainly a fine one. To argue the lack of feasibility is to argue that the 1983 ORS was incapable of being placed on the forklift in 1977 for some reason other than its nonexistence, possibly a mechanical incompatibility. The fact that the 1983 ORS did not exist in 1977, although an intuitively attractive argument, does not mean that it was incapable of being placed on the truck in 1977 if it did in fact exist.

Therefore, we find that the user letters, concerns, and objections to seat belts are inadmissible, as is the engineers' lack of knowledge whether seat belts would indeed be safer. They are in response to desirability, that is, whether it was advantageous to put ORSs on forklifts. A viable argument would be that the 1983 ORS is not safer, or would not have helped in this situation, although we realize the inconsistency such a position would have in light of the videotapes depicting Clark's ardent support for the 1983 ORS. As we said in *Habecker II*, the decision is made with all available knowledge at the time of the trial. That is simply the nature of strict liability in Pennsylvania. As stated above, Pennsylvania's public policy is to encourage manufacturers to make their products as safe as possible, as soon as possible. It is the jury's prerogative to hold a manufacturer responsible for not more aggressively researching and implementing safety devices.

All this must be integrated with what we said in *Huddel* regarding crashworthiness, that is, that a plaintiff must show that an alternative, safer design *practicable* under the circumstances existed. In Pennsylvania, "practicable under the circumstances" is an element militating toward feasibility. *Practicable* means possible to practice or perform, capable of being put into practice, done, or accomplished, feasible. *Websters' Third New International Dic-*

tionary of the English Language Unabridged. Therefore, like feasibility, that element bars the admission of the evidence Clark would like to present regarding the 1983 ORS's non-existence.[15]

On remand, the district court must conduct a new trial based exclusively on the principles of Pennsylvania crashworthiness law we have described. Thus, Habecker may admit any evidence that demonstrates a safer design, including the Clark videos and anything else depicting the technology that was feasible in 1977. The defendants may not counter with evidence that the 1983 ORS was not in existence at the time of manufacture, nor shall it be permitted to offer any evidence regarding the knowledge of desirability, including the knowledge of any corporations, societies, or committees.[16] They may offer evidence which impacts upon the safety of the ORS suggested by Habecker, and/or its feasibility in 1977.

IV.

Habecker raises a number of issues that were categorically a matter for the district court's discretion. We emphasize that we review these issues under an abuse of discretion standard, and we will not substitute our judgment for that of the district court unless there has been an abuse of discretion. *Stich v. United States*, 730 F.2d 115, 117 (3d Cir. 1984).

A.

Habecker argues that it was an abuse of discretion for the district court to refuse to allow the plaintiff to raise on retrial the issue whether the forklift was defective due

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[15] Habecker raises two other issues that, because of our result here, have become moot: (1) jury instructions; and (2) misconduct in questioning.

[16] While accepting the testimony for qualifying expert witnesses, the district court must be careful to scrutinize for this type of evidence.

to the lack of post-sale warnings. Habecker was under the mistaken belief at the first trial that the district court's elimination of the retrofit issue also precluded the issue of failure to give a post-sale warning of defectiveness. In *Habecker I* we held that Habecker's assumption was erroneous and that the district court did not rule on the issue of post-sale warnings regarding defectiveness. *Id.* at 54 n. 4. At the second trial the district court took a narrow view of its discretion and only permitted one issue to be tried—whether the forklift was defective when it left the manufacturer because it lacked a seat belt or an ORS. *Habecker II*, at 217.

After the second trial had taken place, the Pennsylvania Superior Court issued an opinion recognizing a post-sale duty to warn in Pennsylvania. *Walton v. Avco Corp.*, 383 Pa.Super. 518, 557 A.2d 372 (1989); *allocatur granted*, 524 Pa. 594, 568 A.2d 1245, 1249 (1989). Habecker moved for permission to raise the post-sale duty to warn issue at the third trial. The district court denied the motion for a number of reasons: (1) the *Walton* case was in conflict with other Superior Court cases; (2) the district court distinguished the facts of this case from the facts of *Walton*; (3) the *Walton* case was the only case in Pennsylvania recognizing such a duty; and (4) the opinion itself warned that the duty was only to apply to "unique and costly products" and not "household goods." The district court concluded that forklifts, unlike the helicopters in *Walton*, militate toward the common product side of the spectrum.

Prior to the start of the third trial, the Pennsylvania Supreme Court issued its opinion in *Walton*, affirming the Superior Court's decision on the post-sale duty to warn. *Walton v. Avco Corp.*, 530 Pa. 568, 610 A.2d 454 (1992). Habecker then filed a motion for reconsideration with the district court; however, the district court remained faithful to its initial analysis of the case. The court held:

> As an initial matter, the court wishes to underline the procedural footing of this motion. The court is not in a position where it is deciding a motion to dismiss prior to trial; instead, the court is merely weighing whether or not, in its discretion, it believes that Plaintiffs should, going into a retrial, be permitted to pursue a cause of action which had been neither pled nor pursued at the prior trial.

538A.

The court noted that the Pennsylvania Supreme Court's decision in *Walton* rendered invalid two of its four justifications—numbers 1 and 3—for denying Habecker's motion to proceed with a post-sale duty to warn claim. The court also noted that factors 2 and 4 of its earlier opinion remained firm and weighed against permitting Habecker to raise this claim. Accordingly, the district court exercised its discretion and denied Habecker's motion for reconsideration, thus excluding a post-sale duty to warn claim as set forth in *Walton v. Avco.*

We have consistently recognized that the assertion of new issues on retrial is typically within the sound discretion of the district court. As presider over the trial, the district court is in the best position to control all aspects of trial, including further motions, discovery and court time. We cannot say that the district court did not exercise sound discretion in denying Habecker's motion.

As alternative support for this result, Clark and Forklifts submit that Habecker did not raise this issue in the first amended complaint and that it was not until the pretrial memorandum that it was raised. There are two types of warnings at issue here: (1) a warning to operators not to jump during a lateral turnover; and (2) the post-sale duty to warn of a defective product. A review of the pleadings prior to the first trial demonstrates that Habecker did raise an issue regarding warnings: "Lack of adequate warnings and/or instructions." 53A. Federal

Rule of Civil Prodcedure 8 only requires notice pleading; therefore, Habecker did not need to specify what type of warnings were lacking. We note, however, that the district court subsequently granted motions for summary judgment for Clark and Forklifts "on the issue of warnings." Order of October 14, 1988, 122A. Therefore it appears to us that if Habecker was intending to take advantage of notice pleading by not expressing the type of warning being raised, then the district court's order dismissing any issue regarding warnings would encompass whatever was intended.[17]

We also notice that the district court stated in its memorandum opinion of March 31, 1992 that Habecker had opted not to pursue a cause of action for post-sale duty to warn at the first trial because the law was unsettled with regard to whether such a failure to give post-sale warnings would give rise to a strict liability cause of action in Pennsylvania. Memorandum of March 31, 1992, 412A. Further, we are impressed by the discussion in chambers prior to the second trial. 725A-27A. Counsel for Clark explained to the court that the only issue regarding the duty to warn raised at the first trial was the duty to warn not to jump from the forklift. Notably, argument before the magistrate judge included only that pertaining to the duty to warn not to jump during a lateral turnover. There was no other warning issue pursued at trial, no evidence admitted, no argument to the jury and no points for charge requested on post-sale duty to warn.

Therefore, we are led to the inevitable conclusion that the district court acted well within its discretion in refusing to allow Habecker to pursue the post-sale duty to warn issue. Nonetheless, in accord with *Habecker II*, we will again refrain from expressing a view on whether the dis-

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[17] We note that in *Habecker I* we held that the district court did not address the post-sale duty to warn. It appears that this is because Habecker did not raise it.

trict court should permit a new theory of liability to be pursued on retrial. The matter will be left to the sound discretion of the district court. *Id.*, at 218.[18]

B.

Habecker argues that the district court abused its discretion in refusing to allow the issue of whether the forklift was defective when it was leased in 1983 and 1984. Strict liability in Pennsylvania is extended to all suppliers of a product that is "consumed" by the public. *Francioni v. Gibsonia Truck Corp.*, 472 Pa. 362, 372 A.2d 736 (1977). Forklifts, which leased the forklift to the government, could possibly be liable to Habecker under such a theory. At the first trial Habecker chose not to pursue this issue "for tactical reasons." Memorandum Opinion of March 31, 1992, 410A. Prior to the third trial, Habecker filed a motion asking the district court to reinstate this claim. The district court denied the motion, relying heavily on the argument by the defendants that to permit Habecker to pursue the lease claims now would work an extereme prejudice on Forklifts due to its reliance on

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[18] Habecker also argues that the district court abused its discretion in restricting them to the evidence, witnesses, and testimony from the first trial. We held in *Habecker II* that such rulings were within the district court's discretion and the district court has issued a sound opinion on this issue. Our review does not reveal an abuse of discretion.

Similarly, Habecker argues that the district court abused its discretion in denying the request to compel answers to interrogatories from 1987. The district court addressed this issue twice, the second time in a well reasoned opinion. We see no abuse of discretion.

Finally, Habecker argues that the district court abused its discretion in restricting the scope of cross-examination of two defense experts. Specifically, Habecker wanted to question the experts on matters the experts had noted in their files but which they did not rely on for their opinion. We find no abuse of discretion here.

Habecker's actions and representations prior to the first trial.

Prior to the first trial Habecker dismissed all negligence claims. Because Habecker was not pursuing the defectiveness of the forklift in 1983 and 1984 and because the negligence claims against Forklifts had been dropped, Forklifts had no need to maintain its third party action against the United States. As a result, Forklifts dropped the United States from the lawsuit.[19]

Habecker argues that Forklifts' reasons for dismissing its third party complaint against the government had nothing to do with Habecker's decision not to pursue the negligence claims against Forklifts. The district court, which was in the best position to monitor what had transpired, disagreed. The record does not indicate why Habecker chose not to pursue the defectiveness of the forklift at the time of its lease; however, it is clear that Habecker made that choice. Therefore, we find that the district court did not abuse its discretion in denying Habecker's motion to pursue the defectiveness of the forklift during the 1983 and 1984 leases, 797 F.Supp. 381.

C.

Habecker argues that the district court abused its discretion by refusing to allow the testimony and photographs of David Wile, the New Cumberland Army Depot's Safety Director. After the accident Wile conducted an investigation and attempted to simulate the accident. Wile was never listed in a discovery response or pretrial memorandum as an expert witness, and as a result, the district court refused to recognize Wile as an expert. The district court was certainly entitled to enforce its pretrial order,

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[19] Forklifts had an indemnity agreement contained in the written lease for the forklift with the United States New Cumberland Army Depot. The United States agreed to "save and hold harmless Forklifts, Inc. from any and all claims or suits. . . ."

requiring the listing of witnesses in compliance with discovery requests by limiting Habecker to the experts identified in the witness list and in responses to interrogatories requesting the identity of experts and the substance of their testimony. *Franklin Music Company v. ABC,* 616 F.2d 528, 539-40 (3d Cir.1979). Such an order will not be disturbed absent a clear abuse of discretion. *Id.*

As a second basis for its ruling, the district court held that Wile's simulation was not reliable, and that certain factors were missing which would cause problems for the other experts. The record demonstrates that Wile did not have an engineering degree and had never taken a course in structural engineering or biomechanical engineering. Nor has he had any training in dynamics, physics or kinematics. In fact, Wile testified that he had never heard of the word "kinematics." His experience in mathematics, physics and dynamics arises from a layman's point of view. He testified that he was not a trained mechanic but did have mechanical abilities.[20]

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, —— U.S. ——, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Supreme Court has recently explained that the district court must ensure that any and all scientific testimony or evidence is reliable. Further, Federal Rule of Evidence 702 requires that the evidence or testimony assist the trier of fact in understanding the evidence or a fact in issue.

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[20] Wile has a degree from Penn State in social science. He worked for State Farm Insurance Company for four years as an accident investigator and damage appraiser. While with State Farm he received training in accident occurrence and recreation, and how to record and document evidence. During his employment with the United States government, Wile took courses involving occupational safety and health, industrial safety, industrial hygiene and accident investigation. Wile cautioned that his training did not involve engineering or physics and that the government would hire a specialist in that area if that expertise was needed.

This question, the Supreme Court held, goes to relevance.[21] *Id.* —— U.S. at ——, 113 S.Ct. at 2795 (citing *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985) (approving of Judge Becker's description of "fit")). The test entails the district court's preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether it can be applied to the facts in issue. *Id.* —— U.S. at ——, 113 S.Ct. at 2796.

To that end we note that during the simulation the ramp was pulled away from the trailer instead of moving on its own. There was no operator on the forklift nor was there cargo on the fork. The height of the fork was disregarded and the rearward movement of the forklift was not replicated. Although Wile recognized the velocity of the forklift as an important effect, he made no attempt to duplicate it. The district court held that the attempt at the accident simulation was unreliable. Further, although not stated by the district court, it appears that the evidence from Wile's simulation does not "fit" the facts of this case and would not assist the trier of fact in determining how the accident occurred.

Therefore, in light of the test set forth in *Daubert*, we hold that the district court did not abuse its discretion in refusing to allow Habecker to admit Wile as an expert or to permit him to testify about his report.

D.

Habecker complains that the trial court abused its discretion in failing to strike the testimony of Dr. Cline Turner Young, which was based on facts contrary to the

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[21] We had held in *Habecker I* that the proffered knowledge, skill, experience, training or education possessed by an expert goes to the weight of the testimony not its admissibility. However, recently, the United States Supreme Court held that the test set forth in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), has been displaced by the Federal Rules of Evidence.

facts stipulated by the parties. Specifically, Habecker argues that the parties agreed that the forklift fell only one foot rather than four feet as Dr. Young opined. However, our review of the stipulations read to the jury reveals that no distance was specified. In fact, our review of Dr. Young's testimony reveals that he was calculating the change in forces if the forklift dropped only one foot, where the chance of a brain injury fatality would be 90%, as opposed to a four foot drop, where the chance of a brain injury fatality would be "99 plus, plus, plus percent." It appears that Dr. Young believed that Mr. Habecker would have died as a result of the accident whether the forklift fell one foot or four feet.

Contrary to Habecker's assertion, the record reveals that Dr. Young's testimony was confined to hypotheses consistent with the evidence before the jury. Dr. Young carefully explained every step of his analysis and cited the sources of each piece of his data. Further, it does not appear that Dr. Young's testimony contradicted the stipulation but merely supplemented it. The stipulation gave only a general account of what transpired and did not completely explain the physical evidence; Dr. Young's testimony provides in more detail his opinion as to how the accident occurred. Therefore, we hold that the district court did not abuse its discretion in denying Habecker's motion to strike Dr. Young's testimony.

V.

Thus, for the foregoing reasons we will vacate the district court's judgment on the verdict and remand for a new trial.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 90-5645

CONNIE L. HABECKER, Individually and as Personal Representative of the Estate of JOHN R. HABECKER, Deceased; JOHN MICHAEL HABECKER, Minor, by CONNIE L. HABECKER, his Parent, Natural Guardian and Next Friend,

Appellants,

v.

CLARK EQUIPMENT CO.; FORKLIFTS, INC.,

Appellees.

Argued Feb. 28, 1991

Decided Aug. 21, 1991

Rehearing Denied Sept. 27, 1991

Before STAPLETON and ALITO, Circuit Judges, and CAHN, District Judge *.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

Connie Habecker and John Michael Habecker, decedent's wife and minor child, claim that defendants are strictly liable for John Habecker's death under the doctrine of "crashworthiness" because a forklift without an

* Honorable Edward N. Cahn, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

operator restraint system is a defective product. Appealing for the second time from a jury verdict for defendants, the Habeckers raise two major claims.[1] First, they argue that the district court erred in admitting evidence of what was known in the industry when the forklift was manufactured about the desirability of operator restraint systems, evidence that they claim is irrelevant in a strict liability case. Second, they claim that the district court erroneously believed that it could not permit new legal theories and evidence on retrial. Because we conclude that evidence of what was known at the time of manufacture about the desirability of a safety feature is irrelevant in a crashworthiness case and that a substantial possibility exists that the inadmissible evidence influenced the jury, we will reverse the district court's judgment and remand for a new trial. On remand, the district court may exercise its discretion as to whether the Habeckers should be allowed to present new theories not barred by this court's mandate or its own prior orders that were not appealed.

I.

John Habecker was killed while attempting to back a forklift down a ramp. The forklift went off the side of the ramp; Habecker was thrown out and crushed beneath the forklift. The forklift, manufactured by Clark Equipment Company ("Clark") and leased by Forklifts, Inc., ("Forklifts") was not equipped with operator restraints, such as a seat belt or harness. The accident happened during the course of Habecker's employment as a civilian employee of the New Cumberland Army Depot.

Although this case originally included implied warranty and negligence claims, those claims were eliminated from the case before the first trial. Once the case was limited to strict liability, Forklifts appeared to be indemnified by

[1] They also claim the district court abused its discretion in making specific evidentiary rulings. We have reviewed those rulings and affirm them without further comment.

Clark for any potential liability; therefore, in a stipulation signed by all the parties, Forklifts dismissed with prejudice its third-party claims against the Department of the Army and the United States.

After the first trial, the district court granted a directed verdict for the manufacturer of the ramp and a directed verdict for Clark and Forklifts on the issue of whether the forklift's throttle was defective. The question of whether Clark and Forklifts were strictly liable for the absence of operator restraints in the forklift went to the jury, which ruled for defendants. On appeal, this court concluded that the district court had violated Rule 702 of the Federal Rules of Evidence by refusing to permit one of the Habeckers' expert witnesses to testify and that this exclusion could well have affected plaintiffs' substantive rights. 893 F.2d 49, 53 (3d Cir. 1990). Therefore, this court upheld the directed verdicts, but remanded the case "for a new trial against defendants Clark and Forklifts on the operator restraints issue." *Id.* at 54.

Throughout the first trial, the Habeckers argued only that the forklift was defective at the time it was manufactured—making the liability of Clark and Forklifts coterminous. Before the second trial, however, the Habeckers stated for the first time that they wished to pursue an additional theory of strict liability against Forklifts based on the hypothesis that Forklifts had placed the forklift in the stream of commerce in a defective condition when it leased the forklift to the Army in 1983 and 1984. The district court refused to allow that theory or any other theory that had not been asserted at the first trial, apparently concluding that our mandate deprived it of discretion to permit the assertion of new theories of liability. The district court also refused to allow any evidence or witnesses not listed for the first trial. The Habeckers then agreed to dismiss Forklifts, without prejudice to their right to argue on appeal that they were entitled to pursue liability arising from the leases. The trial was held from June 18, 1990 to June 25, 1990, and a jury verdict was returned in favor of defendant. Final

judgment was entered in favor of defendants, and the Habeckers filed this timely appeal.

II.

In a motion in limine and throughout the trial, the Habeckers consistently objected to evidence concerning what the industry knew about the efficacy of operator restraint systems in 1977. In particular, they objected unsuccessfully to evidence offered by Clark tending to show that the industry had been unable to determine whether operator restraint systems reduced the risk of serious injury to the operator and that it was only later, after the development of more sophisticated computer modeling, that the industry decided it was desirable to equip forklifts with such systems. As of 1977, Clark's evidence suggested, a manufacturer simply could not have known whether operator restraint systems created more risks than they eliminated.

The Habeckers claim that this evidence was inadmissible and, combined with the defendant's closing argument, improperly focused the jury's attention on Clark's conduct, rather than on the forklift itself. Because Clark conceded that operator restraint systems were feasible at the time the forklift was manufactured, the Habeckers argue that the only question for the jury was whether—seen in light of all the evidence available today—a forklift without an operator restraint system is "defective." While they acknowledge that evidence of whether a restraint system results in a net reduction in the risk of serious injury is relevant to that issue, the Habeckers insist that evidence of whether one could have known of that net reduction in 1977, including evidence of computer modeling capability at that time, is irrelevant to that issue. For the reasons that follow, we agree.

A.

Section 402A of the Restatement (Second) of Torts, adopted in Pennsylvania, states in relevant part,

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused. . . .
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product. . . .

Pennsylvania law recognizes that a product may be "defective" not only because of an error in manufacturing, but also because of its design:

> the jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.

Azzarello v. Black Brothers Co., 480 Pa. 547, 391 A.2d 1020, 1027 (1978).[2] Under the doctrine of crashworthiness, the manufacturer's liability for producing defectively designed products includes liability for failing to provide safety features and liability for providing inadequate safey features. As this court has noted,

> crashworthiness . . . is a variation of strict liability theory. . . . [It] extends the manufacturer's liability to situations in which the defect did not cause the accident or initial impact, but rather increased the severity of the injury over that which would have occurred absent the defective design.

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[2] In adopting this definition of defect, the Pennsylvania Supreme Court reject the more common approaches that define defect by considering consumer expectations or by balancing the utility and risks of a product. "The decision of this Court in *Azzarello* sets forth yet [a third] approach to the question of when a design defect may be found to exist." *Lewis v. Coffing Hoist Division, Duff-Norton Co.*, 515 Pa. 334, 528 A.2d 590, 593 (1987). Whatever the relative merits of these definitions we are bound by that court's choice.

Barris v. Bob's Drag Chutes & Equipment, 685 F.2d 94, 99 (3d Cir.1982). Thus, crashworthiness imposes liability on the manufacturer for enhancing or failing to minimize injuries suffered in an accident, rather than for causing the accident.

This court first addressed crashworthiness in *Huddell v. Levin*, 537 F.2d 726 (3d Cir.1976), a case decided under New Jersey law. In that case, Dr. Huddell's car stalled when he ran out of gas and was struck from behind by another vehicle "at a considerable rate of speed." The impact caused Dr. Huddell's head to hit his head restraint at about 10 m.p.h. Dr. Huddell died one day later of brain damage. His wife sued the driver of the other vehicle, but also brought suit against the manufacturer on the theory that the head restraint was defectively designed.

This court began with the legal question of whether the manufacturer owed a duty to Mr. Huddell.

> We take it as beyond peradventure that an automobile manufacturer today has some legal obligation to design and produce a reasonably crashworthy vehicle. The manufacturer is not required to design against bizarre accidents; the manufacturer is not required to produce an accident-proof vehicle. But the manufacturer is required to take reasonable steps —within the limitations of cost, technology, and marketability—to design and produce a vehicle that will minimize the unavoidable danger. . . . [T]he manufacturer must consider accidents as among the "intended" uses of its product.

537 F.2d at 735.

Having found both that the manufacturer owed Dr. Huddell this duty and that Mrs. Huddell had presented evidence to suggest the head restraint was defective, this court held that it was for the jury to determine whether the restraint was defective and whether the defect caused or enhanced Dr. Huddell's injuries. *Huddell* established

the following burden of proof for plaintiffs in crashworthiness cases.

> Unlike orthodox products liability or negligence litigation, crashworthy or second collision cases impugning the design of an automobile require a highly refined and almost invariably difficult presentation of proof in three aspects. First, in establishing that the design in question was defective, the plaintiff must offer proof of an alternative, safer design, practicable under the circumstances. . . . Second, the plaintiff must offer proof of what injuries, if any, would have resulted had the alternative, safer design been used. . . .
>
> Third, as a corollary to the second aspect of proof, the plaintiff must offer some method of establishing the extent of enhanced injuries attributable to the defective design.

Huddell v. Levin, 537 F.2d 726, 737-38 (3d Cir.1976).

Although the Pennsylvania Supreme Court has not had occasion to adopt or reject the crashworthiness doctrine, this court has held that "[t]he crashworthiness doctrine as articulated in *Huddell v. Levin* is applicable to cases governed by Pennsylvania law." *Roe v. Deere and Co.*, 855 F.2d 151, 153 n. 2 (3d Cir.1988); *see also Jeng v. Witters*, 452 F.Supp. 1349 (M.D.Pa. 1978), *aff'd mem.* 591 F.2d 1334 (3d Cir.1979). In *Roe*, a tractor rollover case, we concluded that "[c]rashworthiness is merely a subset of strict liability." 855 F.2d at 154. Because plaintiff had pled strict liability and had presented evidence that the tractor was uncrashworthy, we held that the district court had erred in refusing to charge the jury on the crashworthiness doctrine.

B.

Having predicted that the Pennsylvania Supreme Court would adopt the crashworthiness doctrine, we are required by this case to predict what definition that court would

give that doctrine and, specifically, what evidence it would find relevant in determining liability. The Habeckers argue that it was error for the district court to admit evidence concerning computer modeling capabilities in 1977, because that evidence shifted the focus from the defectiveness of the product to the knowledge and conduct of the manufacturer. Clark responds that the Supreme Court of Pennsylvania would admit such evidence because excluding it would impose strict liability bounded only by the ability of "the fruitful imagination of expert witnesses" to describe safer alternative designs. In essence, Clark argues that a product is not "defective" because of its design if no one could know at the time of manufacture that an alternative design would be safer.

It is important to distinguish evidence of what safety features were *feasible* at the time a product was designed, from evidence of what safety features were *known to be desirable* at that time. Evidence of the first must be admissible in a crashworthiness case. Liability is imposed on a manufacturer in a crashworthiness case for a design defect because an alternative, *feasible*, safer design would have lessened or eliminated the injury plaintiff suffered. If no such alternative feasible design existed when the product was manufactured, then the design cannot be said to be "defective", even if more recent technology has rendered a safer design feasible. Therefore, the fact finder can only determine whether a particular design was defective after hearing evidence about what designs were feasible at the time the product was manufactured and whether they were in fact safer. *Roe*, 855 F.2d at 155 (exclusion of testimony on effectiveness of safety device was error); *see also Huddell*, 537 F.2d at 737; *Craigie v. General Motors Corporation*, 740 F.Supp. 353, 357 n. 8 (E.D.Pa. 1990).

While evidence of a safety feature's feasibility is relevant to whether the product was defective under Pennsylvania law, evidence of what was known about the desirability of a safety feature is not. One commentator has explained that exclusion of evidence of foreseeability is,

indeed, *the* distinction between strict liability for design defects and liability for negligence in designing products. Strict liability for design defect is distinguishable from liability for negligence only if the *actual* risks and benefits of the design are evaluated in a strict liability case without any reference to the *foreseeable* risks and benefits:

> The fact that a risk or hazard related to the use of a product was not discoverable under existing technology and in the exercise of utmost care . . . [is] irrelevant if the product itself and not defendant's conduct is being evaluated.

Prosser & Keeton, *Torts* § 99 at 700 (5th ed. 1984 & Supp.1988); *see also* Note, *Perpetuating Negligence Principles in Strict Products Liability: The Use of State of the Art Concepts in Design Cases*, 36 Syracuse L.Rev. 759, 804 (1985) ("Strict products liability differs from negligence in design cases in that a manufacturer is assumed to have knowledge of all hazards [however unforeseeable] posed by its product.").

Excluding evidence of what was or was not known about the desirability of operator restraint systems in 1977 is consistent with Pennsylvania law's general exclusion of such evidence in strict liability cases:

> Having reached the conclusion that evidence of industry standards relating to the design of the [product], and evidence of its widespread use in the industry, go to the reasonableness of [defendants'] conduct in making its design choice, we further conclude that such evidence would have improperly brought into the case concepts of negligence law. We also conclude that such evidence would have created a strong likelihood of [improperly] diverting the jury's attention from the [product] to the reasonableness of the [manufacturer's] conduct in choosing its design.

Lewis v. Coffing Hoist Division, Duff-Norton Co., 515 Pa. 334, 528 A.2d 590, 594 (1987); *see also Majdic v.*

Cincinnati Machine Co., 370 Pa.Super. 611, 537 A.2d 334, 338-39 (1988); *Santiago v. Johnson Machine and Press Corp.*, 834 F.2d 84, 85 (3d Cir.1987) (applying Pennsylvania law).

In sum, while we predict that the Pennsylvania Supreme Court would hold manufacturers liable only for choosing between the safety features feasible at the time the product was manufactured, we predict it would hold them strictly liable for that choice. Thus, the manufacturer is liable even if it must choose blindly, with no information about the relative merits of safety features, and even if it exercises all possible care in making that choice. This rule can be justified because it provides manufacturers with an incentive to invest, not only in proven safety features, but also in the testing and development of any new feature that may prove superior. "A strict standard of liability offers the strongest possible incentive, an economic one, for the production of safer products." J. Beasley, *Product Liability and the Unreasonably Dangerous Requirement* 61 (1981).

In this case, Clark has conceded that an operator restraint system would have been feasible in 1977. Therefore, in order to determine whether the forklift was "defective", the only question for the jury was whether an operator restraint system is an "element necessary to make [a forklift] safe for its intended use", *Azzarello*, 391 A.2d at 1027, a question that is to be answered on the basis of all the knowledge available at the time of trial. Evidence about what Clark knew or could have known about the desirability of operator restraint systems at the time of manufacture is not relevant to that question. "Since [strict liability is] applicable even to cases in which 'the seller has exercised all possible care in the preparation and sale of his product,' *the standard of care* established by the state of the art is immaterial under strict liability theory." Beasley, *supra*, at 393.

Because under Pennsylvania law, evidence of knowledge about the effectiveness of safety devices at the time

of manufacture is not probative of whether there is a defect in a crashworthiness case, we would expect it ordinarily to be excluded by the courts of Pennsylvania. Clark contends, in the alternative, however, that the evidence it offered about computer modeling was necessary to rebut evidence the Habeckers offered about the feasibility of operator restraint systems in 1977. As noted above, however, a safety feature's feasibility is a separate issue from whether it was known to be effective. Clark also notes that the Habeckers provided the first mention of computer modeling, by offering the "Live to Tell About It" safety video. But that video was offered for the proper purpose of showing that Clark, which produced the video, now believes operator restraint systems are effective safety devices. Clark does not explain how it was prejudiced by the video or why it needed to offer rebuttal evidence about computer modeling. Nor does Clark point to any comment by the Habecker's about Clark's conduct that would open the door to such evidence. Accordingly, we decline Clark's invitation to hold that admission of its evidence concerning the lack of computer modeling capability in 1977 was invited error.

C.

We could uphold the judgment for defendants, despite an erroneous evidentiary ruling, if we were convinced that there is a " 'high probability' " that the error did not prejudice the Habeckers' substantive rights. *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924 (3d Cir. 1985). Thus, the judgment for the defendants should not be set aside if it is highly probable that the jury would have reached the same verdict without hearing the inadmissible evidence. We are not persuaded, however, that the evidence of computer modeling was so benign.

The court properly instructed the jury that it was not to consider Clark's negligence or lack of negligence in reaching its verdict. Nevertheless, it did not specifically instruct the jury that Clark's knowledge or lack of knowledge about the desirability of operator restraint systems

was irrelevant, and Clark's closing statement stressed that no one could be certain about the desirability of operator restraint systems until computer modeling was developed, focusing the jury's attention on the improperly admitted evidence. In arguing that a forklift without such a system was not defective in 1977, Clark stated

> you may have heard [plaintiff's expert] say oh, it was feasible to put a seat belt on the forklift in '77. It was feasible to put a wing on. Sure. Seat belts have been around. They could have thrown a seat belt on the forklift. What would it have cost, nickels and dimes to put a seat belt on? But the point is not trying to cover yourself in litigation or doing what seems to be the simple thing. The question is what is best for the forklift operator. . . .
>
> All the [hazards that might come from including an operator restraint system] were considered, and still they couldn't come up with an answer until the software technology in the computer industry reached a point where they were able to do the kind of computer modeling that you saw on the "Live to Tell About It" video.

App. at 1122a-23a. The court simply instructed the jury that to show defect "the plaintiff must prove by a preponderance of the evidence that an alternative safer design practicable under the circumstances existed." Without further instruction on what "defective" or "practicable" mean, the jury could easily believe that operator restraints were not "practicable" until the industry knew that they prevented more injuries than they caused. In fact, the district court appears to have relied on that theory in admitting the evidence of computer modeling. Thus, a substantial possibility exists that the jury ruled for Clark in the mistaken belief that the folklift was not defective so long as Clark could not have known that an operator restraint system would make it safer. Accordingly, the judgment for defendants must be reversed.

III.

Because the issue is likely to surface again on retrial, we note that the district court appears to have taken too constricted a view of its own authority on remand. While the parties were preparing for the second trial, the court issued an order stating in relevant part:

> the sole issue for retrial is whether the forklift was defective when it left Clark Equipment Company in 1977 because it lacked a seat belt or operator restraint system; . . .
>
> the parties will be confined to presenting evidence through the witnesses listed in their original pretrial memorandum . . .

App. at 162a-63a.

Thereafter, in the course of denying the Habeckers' request for a continuance to pursue further discovery, the court stated:

> . . . I have been trying to keep this case within the confines of my interpretation of the Third Circuit opinion.
>
> I cannot seem to find anything in [the (sic)] case that would support starting from scratch on this whole thing. I think that I am confined to retry the case on the issue that is left in the case, and that is whether the product was defective for failure to have an operator restraint system.
>
> Nobody has come up with anything to convince me that I can go beyond what the discovery is as of the date of this opinion, that I can allow other issues to come in. Nobody has given me anything to even justify my restricted, and I'll guarantee you it's a very restricted view of this opinion as to how I think this second trial should go.

App. at 245a-46a.

The district court was correct in believing that it was bound by our mandate on remand, but it also apparently believed that it had to limit the second trial to the sole issue mentioned in our mandate. We can understand how our mandate could be so read, but it was not our intent to so limit the district court. We referred only to the operator restraint system issue because that was the only issue remaining of those raised by the parties on appeal.

"While a mandate is controlling as to matters within its compass, on remand a lower court is free as to other issues." *Sprague v. Ticonic Bank*, 307 U.S. 161, 168, 59 S.Ct. 777, 781, 83 L.Ed. 1184 (1939). For this reason, a district court ordinarily has substantial discretion in conducting further proceedings after a remand.

> From the proposition that a trial court must adhere to the decision and mandate of an appellate court there follows the long-settled corollary that upon remand, it may consider, as a matter of first impression, those issues not expressly or implicitly disposed of by the appellate decision. . . . A trial court is therefore free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not settled by the decision.

Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943, 950 (3d Cir. 1985); *see also Int'l Union UAW v. Mack Trucks, Inc.*, 917 F.2d 107, 110-11 (3d Cir. 1990); *Taylor v. U.S.*, 815 F.2d 249, 252 (3d Cir. 1987). A district court's discretion therefore includes the authority to allow any theory that would be supported by the complaint and that was not eliminated either by its earlier orders, not pursued on appeal, or by this court's mandate. For example, the district court's earlier order dismissing all negligence claims would bar any attempt to revive those claims and this court's affirmance of the directed verdict for defendant on the throttle issue would bar any attempt to argue liability based on that alleged

defect, but other theories can be pursued if the district court concludes that justice so requires.

We express no view on whether the district court should permit a new theory of liability to be pursued at this stage of the proceeding. The district court may well determine that allowing the Habeckers to pursue a theory of liability not raised until after the close of discovery and the completion of an entire trial would result in undue prejudice to the defendants. Moreover, the district court may conclude that Forklifts—which has dismissed its third-party claim against the Army—would be unfairly prejudiced by permission to litigate a new theory. We hold only that the decisions on whether to allow new claims, whether to permit further discovery, and whether to hear additional evidence were all within the district court's discretion.

IV.

Evidence of computer modeling capabilities in 1977 should not have been admitted into evidence and its admission may have affected the outcome of the proceedings. Accordingly, we will reverse the judgment for the defendants and remand for a new trial.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 89-5187, 89-5273

CONNIE L. HABECKER, Individually and as Personal Representative of the Estate of JOHN R. HABECKER, Deceased; and JOHN MICHAEL HABECKER, Minor, by CONNIE L. HABECKER, his Parent, Natural Guardian and Next Friend,

Appellants.

v.

COPPERLOY CORPORATION;
CLARK EQUIPMENT COMPANY,

Defendants,

and

FORKLIFTS, INC.,
Defendant and Third Party Plaintiff,

v.

CLARK EQUIPMENT COMPANY; R.L. JEFFRIES TRUCKING CO., INC.; DEPARTMENT OF THE ARMY, UNITED STATES OF AMERICA; and UNITED STATES OF AMERICA,

Third Party Defendants.

Argued Oct. 16, 1989

Decided Jan. 8, 1990

Rehearing and Rehearing In Banc Denied
Feb. 7, 1990

Before BECKER, COWEN and SEITZ, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.

Plaintiffs, the widow and child of John Habecker, brought this products liability action in the district court for the Middle District of Pennsylvania based on theories of strict liability, breach of implied warranty, and negligence. Habecker, a civilian employee of the New Cumberland (PA) Army Depot (NCAD), was killed when the forklift he was backing off a ramp went off the side of the ramp and turned over. Habecker was ejected and crushed to death when the forklift fell on top of him. The forklift, manufactured in 1977 by Clark Equipment Company, was not designed with (and did not contain) any operator restraints, such as seat belts. Plaintiffs brought the present action against Clark; Forklifts, Inc., the corporation that leased and maintained the forklift; and Copperloy Corporation, the manufacturer of the ramp. Jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332, and Pennsylvania law applies.

Plaintiffs' implied warranty and negligence claims were dismissed before trial. The strict liability theories were grounded on alleged defects in both the forklift and the ramp. Plaintiffs alleged that the forklift was defective because it had a sticking throttle and because it had no operator restraints (seat belts). Plaintiffs alleged that the ramp was defective because it lacked adequate warnings as to the proper manner of its hook-up and because it did not have an overload relief valve that would cause the ramp to settle, instead of turn over, when there was too much weight on a portion of the ramp. The district court granted a directed verdict for Copperloy on both claims that the ramp was defective (thus relieving Copperloy of all liability) and a partial directed verdict for Clark and

Forklifts on the throttle issue.[1] The jury returned a verdict for defendants Clark and Forklifts on the seat belt issue.

Plaintiffs appeal, challenging several of the district court's evidentiary determinations and its conclusions on sufficiency of evidence. We will affirm the district court's grant of a directed verdict in favor of Copperloy, and also its grant of a partial directed verdict in favor of Clark and Forklifts (on the defective throttle issue). However, we will reverse and remand for a new trial on the operator restraints issue. We do so because we conclude that the district court erred in refusing to permit Raymond Brandt, who possessed a master's degree in safety education and a doctorate in human factors and product safety design, and who had worked in the health and safety sciences for thirty-three years, to testify as an expert witness for plaintiffs about the causal relation between the lack of operator restraints and operator injury. Although Brandt did not possess an engineering degree, our jurisprudence does not permit the exclusion of a proffered expert with a background as extensive as his. And, although Brandt's testimony would have been cumulative to the testimony of another expert on the issue for which plaintiff sought to proffer his testimony, the defendants (collectively) offered three witnesses on the issue, and, under all the circumstances, we cannot say that the error was harmless.

I.

During the trial, plaintiffs produced two expert witnesses. Plaintiffs' first witness, Nicholas Miller, testified about OSHA requirements concerning seats belts for fork-

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[1] **The district court had excluded a fair amount of plaintiff's proposed evidence on the sticking throttle issue. Statements of other forklift operators about past problems with the throttle, a statement by the decedent concerning the sticking throttle, and the observations of David Wile, a former NCAD safety director, about the sticking throttle were all ruled inadmissible on either relevancy or hearsay grounds. The district court also refused to admit into evidence two NCAD reports concerning the accident which would have shown that the throttle had a tendency to stick.**

lifts used in the construction industry. He also testified about the relationship between the lack of operator restraints and operator injury. Brandt was plaintiffs' second witness. He testified about the lack of warnings on the hook-up of the mobile yard ramp. However, as discussed, Brandt was not allowed to testify about the causal relationship between the lack of operator restraints and operator injury. We review decisions of the district court pertaining to the admission of expert testimony for abuse of discretion. *Knight v. Otis Elevator Co.*, 596 F.2d 84, 87 (3d Cir.1979).

A.

The principle of liberal admission of expert testimony is found in Rule 702 itself, in the advisory committee note to the rule, and in our case law. Beginning with Rule 702 itself, it provides that a witness may qualify as an expert by "knowledge, skill, experience, training *or* education" (emphasis added).[2] This principle of liberal qualification of experts can also be found in the advisory committee note to the rule, which elaborates on the meaning of "expert," explaining that the word "expert" should not be defined in a narrow sense. Its last paragraph states:

> The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large

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[2] **Fed.R.Evid. 702 provides in full:**

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

> group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

Fed.R.Evid. 702, advisory committee's note.

Finally, this principle of the liberal qualification of experts can also be found in the case law of the circuit. The leading case is *Knight v. Otis Elevator Co.*, 596 F.2d 84 (3d Cir.1979), where the plaintiff brought a products liability action asserting that she was injured when the door of a freight elevator in her employer's workplace prematurely closed and struck her. Among other defendants, she sued Otis Elevator Co., which designed, manufactured and installed the elevator. Her expert was a consulting chemist and engineer specializing in materials engineering and safety. He also had taught a course at the University of Pittsburgh engineering school, had designed safety equipment for eighteen years, and had designed button guards to prevent inadvertent activation of machinery. Plaintiff sought to have him testify that unguarded elevator control buttons constituted a design defect. Nonetheless, the district court excluded the testimony because it believed that such testimony would require some background in the design and manufacture of elevators. At the close of plaintiff's case, the district court granted defendants a directed verdict, concluding that no evidence had been introduced to show a design defect.

We reversed and remanded for trial, holding that the proposed expert should have been allowed to testify because his inexperience in the areas of design and manufacturing should go to the weight, not the admissibility, of his opinion. *Knight* at 88. We reasoned that the weight to be assigned his opinion was within the province of the jury. *Id.* Thus, in *Knight*, we established a liberal policy of admitting expert testimony which will aid the trier of fact.

More recently, in *Hammond v. International Harvester Co.*, 691 F.2d 646, 652-53 (3d Cir.1982), we upheld the district court's decision to allow a witness to testify

as an expert in a products liability action involving a tractor, even though the expert's only qualifications were work experience selling automotive and agricultural equipment and teaching automobile repair at a high school. We invoked Rule 702, and noted that the witness appeared to qualify as an expert by virtue of knowledge and experience. *Id. See also In re Japanese Electronic Products*, 723 F.2d 238, 279 (3d Cir. 1983) ("doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusions" (quoting 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[03] at 702-14-15 (1982)), *rev'd on other grounds sub nom. Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). *See also Roe v. Deere & Co., Inc.*, 815 F.2d 151, 155 (3d Cir.1988), and *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 114-15 (3d Cir.), *cert. denied*, 484 U.S. 853, 108 S.Ct. 156, 98 L.Ed.2d 111 (1987) (both noting that Fed.R.Evid. 702 establishes a liberal policy of admitting evidence which will aid the trier of fact and citing to *Knight*).

B.

As we have discussed, Brandt, plaintiffs' proposed expert, has a master's degree in safety education, has a doctorate in human factors and product safety design, teaches at Purdue University, is active in product safety groups and societies, and has been employed as a safety specialist. We are cognizant of the deference to be accorded the district court in matters pertaining to the admission or exclusion of expert testimony, but we conclude, nonetheless, that, in light of the jurisprudence we have described, Brandt's background qualified him as an expert on the causal relationship between the lack of operator restraints and operator injury. Rule 702 requires only that Brandt qualify as an expert by virtue of knowledge, skill, experience, training, *or* education. Although we suspect that Brandt, with his background, could qualify

under each individual category listed in the rule, we simply hold that taking them in sum he qualified to testify on the operator restraint issue. Accordingly, we conclude that the district court abused its discretion by excluding Brandt's testimony.

C.

Clark and Forklifts argue that even if the district court abused its discretion, any error was harmless because Brandt's testimony would have been the same as that of another expert the plaintiffs proffered. Fed.R.Civ.P. 61 provides, *inter alia*, that "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." However, we have held that errors in civil cases (like errors in criminal cases) are not harmless unless it is " 'highly probable' " that they did not affect a party's substantial rights. *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 923-28 (3d Cir.1985). While Brandt's testimony may have been cumulative to the testimony of Nicholas Miller, having two expert witnesses testify, instead of one, could easily have made the jury more likely to believe plaintiffs' theory, particularly given that the defendants collectively offered the testimony of *three* witnesses on the issue. Therefore, we cannot say that the exclusion of Brandt's testimony is such that it is "highly probable" that it did not affect plaintiffs' substantial rights. Accordingly, the jury verdict for defendants Clark and Forklifts on the operator restraints issue must be set aside and the case remanded for a new trial.

II.

Plaintiffs argue that the district court erred by continually admitting, over their objections, extensive testimony and evidence about industry standards, government regulations, and other "state of the art" matters concerning operator restraints, because such evidence is inadmissible in products liability cases governed by Pennsylvania law. The district court recognized the validity of this complaint, admitting the evidence only because it believed

that plaintiffs had "opened the door" by introducing such evidence themselves. Plaintiffs rejoin, in effect, that they opened the door but a crack and the district court effectively pushed it wide open.

We find it unnecessary to address this issue because the case must be re-tried. The district court has recognized the problem, and we are confident that it will carefully limit the admissibility of such evidence on retrial.

The plaintiffs have made a number of additional arguments. They contend that the district court erred by granting a directed verdict to defendant Copperloy, and a directed verdict to defendants Clark and Forklifts on the "sticking throttle" issue. They also argue that the district court erred by refusing to admit the two NCAD investigative reports, *see supra* n. 1; by refusing to admit into evidence the testimony of safety officer David Wile about his post-accident observations of the sticking throttle, *see supra* n. 1; and by eliminating the issue of retrofitting the forklift with a seat belt.

Contrary to plaintiffs' assertions as to the NCAD reports, plaintiffs did not offer these reports into evidence. Thus, the district court did not rule on their admissibility. Certainly, plaintiffs cannot attack a non-existent ruling on appeal. We have considered plaintiffs' arguments with respect to the testimony of David Wile, and conclude that the district court's ruling was well within the discretion afforded district courts in this area.[3] As pertains to the district court's elimination of the retrofit issue, we note that the district court only eliminated the issue of failure to retrofit, and not the issue of failure to give a post-sale warning.[4] Thus, *Walton v. Avco Corp.*, 383 Pa.

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[3] Furthermore, we conclude that even if the testimony of David Wile was erroneously excluded, a directed verdict would still have been proper because there still would be insufficient evidence of causation. *See, infra* p. 54.

[4] Plaintiffs assert that the district court improperly eliminated the issue of failure to give a post-sale warning. We are of the opinion, however, that, even if Pennsylvania law imposes liability

Super. 518, 557 A.2d 372 (1989), cited by the plaintiffs, is inapplicable. As to the retrofit issue, no Pennsylvania case has recognized a duty to retrofit, and, indeed, one Pennsylvania case has suggested that such a duty would be inappropriate under established principles of Pennsylvania law. *See Lynch v. McStome & Lincoln Plaza Assoc.*, 378 Pa.Super. 430, 440-41, 548 A.2d 1276, 1281 (1988). Thus, we also affirm the district court's ruling on this issue.

With respect to the directed verdicts issues, we have reviewed the record and agree with the district court that, although plaintiffs did introduce extensive evidence at trial as to the fact that the forklift may have had a sticking throttle and that the mobile yard ramp may have been defective, they did not introduce any evidence from which the jury could reasonably infer that a sticking throttle or a defect in the mobile yard ramp *caused* John Habecker's death. Causation is an essential element of a products liability (or any other tort) action. The Restatement (Second) of Torts § 431 (1965) provides that, at a minimum, the tortfeasor's actions must be shown to have been a "substantial factor" in bringing about the harm to the plaintiff. This section of the Restatement was adopted by the Pennsylvania Supreme Court in *Whitner v. Lojeski*, 437 Pa. 448, 456-57, 263 A.2d 889, 893-94 (1970). *See also Takach v. B.M. Root Co.*, 279 Pa.Super. 167, 170-71, 420 A.2d 1084, 1086-87 (1980). Without introducing evidence of "substantial factor" causation, plaintiffs did not make out a prima facie case. Therefore, we cannot say that the district court erred in its granting of directed verdicts and we will affirm its decision.

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for a post-sale failure to warn, the district court's ruling did not prevent the plaintiffs from raising this issue at trial. They did not do so and thus the district court had no occasion to rule on this warning issue. Thus, there is no error here.

III.

For all of the foregoing reasons, we will reverse the judgment of the district court excluding the proffered expert testimony of Raymond Brandt and will remand for a new trial against defendants Clark and Forklifts on the operator restraints issue. The directed verdict for defendant Copperloy and for defendants Clark and Forklifts on the sticking throttle issue will be affirmed. The plaintiffs, Clark and Forklifts shall bear their own costs. The plaintiffs shall bear Copperloy's costs.

[Filed Feb. 2, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

Civil Action No. 1:CV-86-0352

CONNIE L. HABECKER, Individually and as Personal Representative of the Estate of JOHN R. HABECKER, Deceased; and JOHN MICHAEL HABECKER, Minor, by CONNIE L. HABECKER, his Parent, Natural Guardian and Next Friend, *Plaintiffs*

v.

CLARK EQUIPMENT COMPANY and FORKLIFTS, INC., *Defendants*

MEMORANDUM

Before the court are the parties' various motions *in limine* and several issues raised at the pretrial conference. In addition, both Defendants have filed motions for reconsideration of this court's severance of trial of the claims with respect to Forklifts, Inc. ("Forklifts") and Clark Equipment Company ("Clark"). Because the motions and issues are numerous, the court will address them *seriatim*.

Discussion

I. *Motion for Reconsideration of Severance Order*

On January 15, 1993, Plaintiffs filed a motion for severance of the trial of their claims with respect to defendant Clark and defendant Forklifts. Plaintiffs claimed that they would be prejudiced and the trial unduly confused if both Defendants were joined in one trial. Plaintiffs argue that, based on the Third Circuit decision in this case, *Habecker v. Clark Equip. Co.*, 942 F.2d 210 (3d Cir. 1991) ("*Habecker II*"), state of the art evidence and evidence of 1977 industry standards cannot be of-

fered by Clark because Clark admitted the feasibility of some sort of restraint system in 1977. However, by order dated March 31, 1992, this court ruled that Clark's admission would not bind Forklifts. (March 31, 1992 Order at 21.) Thus, Plaintiffs argue that, if claims with respect to both parties are tried together, evidence of the state of the art and industry standards would be injected into the trial of the claims with respect to Clark "through the back door." Based on these assertions, this court ordered trial of the claims with respect to Forklifts severed from those with respect to Clark. (See Orders dated January 20 and January 21, 1993.)

In its motion for reconsideration and at the pretrial conference, counsel for Forklifts asserted that, at the upcoming trial, Forklifts has no intention of introducing any evidence that Clark is precluded from introducing by *Habecker II*. Based on this assertion, the court no longer sees a need for severance of the trial. Defendant Forklifts will not be allowed to present evidence not admissible with respect to defendant Clark. Having sued two parties, Plaintiffs cannot complain if both are at trial to defend themselves. Therefore, Defendants' motions for reconsideration will be granted and this court's orders of January 20 and 21, 1993 will be vacated.

II. *Unopposed Motions* [1]

Plaintiffs' motion to exclude evidence of decedent's prior guilty plea has not been opposed by either Defendant. Therefore, such evidence shall be excluded.

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[1] The court would admonish all parties to be more attentive to Middle District Rules which require that, before a party files a motion, that party seek concurrence of all other parties. No certificate of concurrence was attached to any of Plaintiffs' or Defendants' motions *in limine*. The rule requiring counsel to seek concurrence is specifically designed to avoid the unnecessary filing of motions which are unopposed and to ensure notice of pending motions to opposing counsel. Both of these purposes have been undermined by the failure of counsel to consult with each other before filing the numerous motions *in limine* in this case.

Defendant Clark does not oppose Plaintiffs' motion to exclude evidence as to assumption of risk by decedent. Defendant Forklifts does not oppose the motion for purposes of this trial. Therefore, the motion will be granted, subject to Forklifts' right to assert such a defense at a later time. No evidence regarding assumption of risk shall be allowed at the upcoming trial.

III. *Motions to Exclude Evidence as to Decedent's Contributory Negligence*

Plaintiffs have filed two motions to exclude evidence regarding contributory negligence. The first motion seeks to exclude one of Defendants' experts, Dr. Cline Young, from raising any issues regarding possible contributory negligence of the decedent. Plaintiffs claim that this evidence is irrelevant and beyond the scope of Dr. Young's identified area of expertise. The second motion seeks, more generally, to exclude the presentation of any evidence or any comment as to contributory negligence, asserting that it would be irrelevant.

This action is proceeding only under a theory of strict liability. This court has already ruled that evidence of contributory negligence is not relevant to this issue. Therefore, the court will exclude any evidence regarding the alleged negligence of decedent. The court will permit Dr. Young and other experts to relate and discuss the facts of the accident. Counsel are cautioned, however, that no attribution of fault to decedent will be permitted by counsel or witnesses.

IV. *Motions to Exclude Certain Letters and/or Other Evidence of Industry Standards and "State of the Art" Evidence*

Plaintiffs have filed a motion to exclude certain letters and studies from users and distributors purporting to show the dangers of restraint systems in forklift turnovers. Plaintiffs also seek to exclude evidence of the state of the art with respect to restraint systems at the time of

manufacture of the subject forklift. Plaintiffs argue that such evidence is barred by the Third Circuit's prior decision in this case. *Habecker II*, 942 F.2d 210. The court will grant this motion, subject to several caveats.

In *Habecker II*, the Third Circuit held that, because Clark conceded that *an* operator restraint system would have been feasible in 1977, "the only question for the jury was whether an operator restraint system is an element necessary to make a forklift safe for its intended use." 942 F.2d at 216. At the pretrial conference, Plaintiffs asserted that Clark had admitted that its 1983 restraint system was feasible in 1977. However, this court previously has ruled that the scope of Clark's admission was much narrower: that Clark conceded only that some sort of wing or seatbelt (or presumably some combination thereof) was feasible in 1977. (March 31, 1992 Order at 20.) The court has reviewed the context and circumstances in which the statements of Clark's counsel were made and reaffirms its March 31, 1992 interpretation of the scope of the admission.

Therefore, if Plaintiffs confine themselves to the scope of Clark's admission, the court will exclude all state of the art evidence and evidence of industry standards. Thus, Plaintiffs may present evidence that a belt or wing or a combination thereof is safer than no restraint system and Defendants may attempt to show, based on the evidence available at the time of trial, that such a system would not have prevented the death or serious injury to the decedent.

However, if Plaintiffs contend or imply that the 1983 Clark system was feasible in 1977, the exclusion of state of the art and other evidence is subject to modification. Plaintiffs are warned not to invite the introduction of the otherwise excludable evidence through the introduction of testimony or exhibits which refer to the 1983 system.

V. *Motion to Exclude "Flyswatter Effect" Evidence*

Plaintiffs have filed a motion to exclude evidence of operator harm in the event of a turnover of a forklift equipped with a restraint system. Particularly, Plaintiffs object to testimony tending to show that a restraint system actually would exacerbate injuries to an operator, rather than minimize them. Plaintiffs contend that such a claim is wholly speculative, as Defendants have been unable to point to even one example of such an occurrence. Further, Plaintiffs argue that such claims are based on studies which would not be admissible as evidence.

Plaintiffs' assertion that Defendants' flyswatter theory is not tenable and that Defendants can point to no actual occurrences of injuries consistent with the theory is an argument for the jury. It goes to the weight of the evidence, not its admissability. Further, Plaintiffs' contention that the theory is based on inadmissable studies and reports is specious. Under Federal Rule of Evidence 703, the facts or data relied on by an expert need not be admissible "if of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject."

Therefore, Plaintiffs' motion to exclude evidence regarding the flyswatter effect will be denied.

VI. *Motion for Permission to File Additional Motions*

Plaintiffs have filed a motion requesting leave to file additional motions *in limine* upon receipt of Defendants' pretrial memoranda. Clark concurs in the motion provided it can file similar additional motions if necessary.

The parties have already filed over a dozen motions *in limine*. The court sees no need for any additional motions. This motion will be denied.

VII. *Defendant Clark's Motion to Exclude Evidence of Certain Prior Accidents*

Defendant Clark has filed a motion to exclude evidence of certain other accidents which it asserts are not suffi-

ciently similar to the Habecker accident to be admissible under Federal Rules of Evidence 401 and 402. Specifically, Clark objects to the introduction of evidence regarding ground level forklift turnovers and off-dock or off-ramp turnovers involving machines equipped with restraint systems. The court is convinced that this issue can be resolved through a stipulation between counsel. The court urges counsel to confer and attempt to agree on the language of such a stipulation before trial. In the event that no such agreement is reached, the court will rule on this issue immediately before trial.

VIII. *Warning Issues*

Plaintiffs continue to assert that Defendants had a duty to warn operators not to jump out of the cab of the forklift in the event of a turnover. This court previously affirmed a magistrate's recommendation that summary judgment be granted in favor of Defendants on this claim. (October 14, 1988 Order at 2.) Therefore, Plaintiffs will not be permitted to introduce such evidence at trial.

Plaintiffs also continue to argue their claim that Defendants had a post-sale duty to warn users of the dangers of the unrestrained operation of a forklift. In its March 31, 1992 order, this court rejected Plaintiffs' post-sale duty to warn claim. (March 31, 1992 Order at 16.) In an order dated August 25, 1992, this court reaffirmed its decision in light of the Pennsylvania Supreme Court decision *Walton v. Avco,* 610 A.2d 454 (Pa. 1992). Therefore, post-sale duty to warn will not be an issue in this case.

Clark has requested an opportunity to put on the record evidence regarding the secondary market in forklifts and the difficulty a manufacturer would have in tracing forklifts beyond the point of sale. Although the court was initially inclined to allow Clark to do so, upon further consideration, the court will deny this request. The court believes that, under the circumstances, such evidence would have little probative value and might be

prejudicial to Plaintiffs. Plaintiffs contend that they would not be in a position to rebut Clark's testimony because there has been no discovery on this issue. The court agrees and, therefore, will not allow Clark to make its proffer.

IX. *Miscellaneous Issues*

1) In their pretrial brief, Plaintiffs indicated an intention to present evidence of and argue that Defendants purposefully destroyed records to hide the dangers of forklift turnovers. (Plaintiffs' Pretrial Brief at 4.) This is not an issue in the case and no such evidence or argument shall be presented at trial.

2) Clark has filed a motion to prohibit Plaintiffs from introducing at trial exhibits not on the exhibit list prepared for the first trial. This court has previously ruled that it will limit parties to the exhibits listed on their initial exhibit list. Therefore, Clark's motion will be granted.

Further, Plaintiffs shall modify their exhibits to conform to this court's ruling on the inadmissability of evidence regarding the 1983 Clark restraint system. Plaintiffs shall redact portions of the exhibits that refer to the 1983 system. In the event that Plaintiffs are unable or unwilling to so amend their exhibits, this court's ruling regarding state of the art and industry standards evidence is subject to modification. If Plaintiffs, through exhibits or otherwise, interject the issue of the 1983 system into the trial, the court may be forced to allow Clark to explain the differences between the 1983 system and that which was feasible in 1977.

3) In their pretrial memorandum, Plaintiffs once again raise the issue of a duty to retrofit. The retrofit issue previously was decided adversely to Plaintiffs and is no longer an issue in the case. *See Habecker v. Clark Equip. Co.*, 893 F.2d 49 (3d Cir. 1990) ("*Habecker I*").

4) At the pretrial conference of this action, Plaintiffs belatedly requested that this court reconsider its order denying Plaintiffs the opportunity to substitute a new expert for one of the experts, Dr. Brandt, who testified for them at the second trial. Plaintiffs requested that this court allow another expert, Dr. Sanchez, to testify, if not in Plaintiffs' case in chief, at least in rebuttal. To allow such a request at the ninth hour would likely be highly prejudicial to Defendants. It is unclear if Dr. Sanchez has been deposed or even answered expert interrogatories. Plaintiffs' request will be denied as untimely.

5) At the same time, however, the court will not allow into evidence a deleterious statement of Plaintiffs' counsel regarding Dr. Brandt. In his request to substitute another expert for Dr. Brandt, Plaintiffs' counsel asserted that Dr. Brandt's credibility had been seriously damaged by facts disclosed at the second trial which were previously unknown to Plaintiffs' counsel. The court believes that the probative value of the admission by Plaintiffs' counsel would be substantially outweighed by the prejudice admission of the statement would cause. Defendants are still free to impeach Dr. Brandt as they did at the previous trial.

An appropriate order will follow.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: February 2, 1993.

UNITED STATES DISTRICT COURT
M.D. PENNSYLVANIA

Civ. A. No. 1:CV-86-0352

CONNIE L. HABECKER, Individually and as Personal Representative of the Estate of JOHN R. HABECKER, Deceased; and JOHN MICHAEL HABECKER, Minor, by CONNIE L. HABECKER, his Parent, Natural Guardian and Next Friend,

Plaintiffs,

v.

CLARK EQUIPMENT COMPANY and FORKLIFTS, INC.,

Defendants.

March 31, 1992

On Motion to Reconsider

Aug. 25, 1992

MEMORANDUM

RAMBO, District Judge.

Before the court are six motions filed in anticipation of the retrial of this strict products liability action—five by plaintiffs and one by defendants—addressing a farrago of issues. These motions are fully briefed and ripe for disposition.

Background

This action arises from the death of John Habecker in 1984. Mr. Habecker, a civilian employee at the New Cumberland Army Depot, was killed when a forklift he

was attempting to back down a ramp slipped off the side of the ramp. The mishap threw Mr. Habecker out of the cab, and he was crushed beneath the falling forklift. The forklift involved in the incident was manufactured by defendant Clark Equipment Company ("Clark") and leased to the Army by defendants Forklifts, Inc. ("Forklifts").

In March 1986, Mr. Habecker's estate, his wife, and his son brought suit in negligence, breach of warranty and strict liability against several defendants, including Clark and Forklifts. Prior to the first trial, plaintiffs dropped the warranty and negligence claims. As only the strict liability claim remained, and Forklifts was indemnified by Clark in such a circumstance, the parties signed a stipulation dismissing with prejudice Forklifts' third party claim against the Department of the Army and the United States.

At the first trial, this court granted a directed verdict against plaintiffs on the issue of whether the throttle was defective. Thus, the only issues which were considered by the jury were whether Clark and Forklifts were strictly liable due to the forklift's lack of an operator restraint system. The jury brought in a verdict for defendants.

Plaintiffs appealed to the Third Circuit Court of Appeals. The Third Circuit found that this court had committed prejudicial error in excluding the testimony of one of plaintiff's expert and remanded the case for a new trial "on the operator restraints issue." *Habecker v. Copperloy Corp.*, 893 F.2d 49, 54 (3d Cir.1990) (hereinafter *Habecker I*). The directed verdicts were upheld. *Id.*

At the first trial, plaintiffs had pursued only the theory that the forklift was defective when manufactured in 1977, and not when it was leased to the Army by Forklifts in 1983 and again in 1984. In a series of letters in April 1990 defendants and plaintiffs traded arguments before the court as to whether the additional theory should be permitted or not. On April 27, 1990, this court issued

an order stating "the sole issue for retrial is whether the forklift was defective when it left Clark Equipment in 1977 because it lacked a seatbelt or operator restraint system."

A second jury trial was held in June 1990, and addressed only issue of whether the lack of restraints made the forklift unreasonably dangerous when manufactured in 1977. Again the jury returned a verdict for defendants.

Plaintiffs appealed once more, this time asserting that this court erred in admitting evidence of what was known in the industry at the time about the efficacy of operator restraints in forklifts in 1977—information which they claimed was irrelevant in a strict liability case. They also argued that this court had taken too narrow a view with regard to its ability to permit the new legal theories to be pursued at retrial.

The Third Circuit again reversed and remanded the case for a new trial. The circuit panel held that this court erred in permitting the testimony establishing the desirability or undesirability of the restraints in 1977, noting

> the only question for the jury was whether an operator restraint system is an 'element' necessary to make [a forklift] safe for its intended use. . . . Evidence about what Clark knew or could have known about the desirability of operator restraint systems at the time of manufacture is not relevant to that question.

Habecker v. Clark Equipment Co., 942 F.2d 210, 216 (3d Cir.1991) (citation omitted) (hereinafter *Habecker II*). The panel found that the admission of this evidence may have improperly focused jury attention on Clark's conduct, and not on the forklift itself and was therefore prejudicial. *Id.* at 216-17.

In addition, the panel wrote that this court's view of the scope of its discretion to allow in new theories upon retrial was too narrow. According to the Third Circuit, a district court is not bound by the Circuit's previous mandate outside of the specific holdings in the opinon.

The third trial in this matter had been scheduled for April 1992 and will be scheduled for some time this spring or in the early summer. Plaintiffs have filed five motions attempting to clarify the issues for trial and to reopen discovery.[1] Defendants have filed a joint "Motion to Limit Issues During Trial."

As the court reads the various motions, it becomes apparent that disposing of some issues will moot related issues raised in other motions. The court will therefore endeavor to consider the motions featuring the dominant issues first, and then address any remaining issues in the following motions.

Discussion

I. "Motion to Allow Issues to be Raised Upon Retrial" and "Motion to Limit Issues During Trial"

The court will first address the motions filed by defendants and plaintiffs attempting to limit or expand (depending on the party's position) the legal theories which may be raised at the third trial. The issues in contention are two:

1) Should plaintiffs be able to claim that the forklift was defective when placed into the stream of commerce by the series of leases between the Army and Forklifts in 1983 and 1984?

2) Should plaintiff be permitted to pursue the theory that the forklift was defective due to a lack of post-sale warnings?

As stated earlier, this court erroneously ruled prior to the second trial that the Third Circuit mandate deprived

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[1] Plaintiffs' motions are styled as: 1) "Motion to Allow Issues to be Raised Upon Retrial;" 2) "Motion for Partial Summary Judgment and/Or to Preclude Defendants from Withdrawing Judicial Admission;" 3) "Motion for Partial Summary Judgment as to Product Defect;" 4) "Motion to Compel Answers to Interrogatories;" and 5) "Motion to Permit Discovery and to Allow Additional Witnesses and Evidence to be Used Upon Retrial."

it of the ability to allow new issues to be pursued upon retrial. The *Habecker II* panel corrected this assumption, stating:

> A district court's discretion . . . includes the authority to allow any theory that would be supported by the complaint and that was not eliminated either by its earlier orders, not pursued on appeal, or by this court's mandate. . . . We express no view on whether the district court should permit a new theory of liability to be pursued at this stage of the proceeding. The district court may well determine that allowing the Habeckers to determine liability not raised until after the close of discovery and the completion of an entire trial would result in undue prejudice to the defendants. Moreover, the district court may conclude that Forklifts—which has dismissed its third-party claim against the Army—would be unfairly prejudiced by permission to litigate a new theory. We hold only that the decisions on whether to allow new claims, whether to permit further discovery, and whether to hear additional evidence were all within the district court's discretion.

Habecker II, 942 F.2d at 218. The Third Circuit clearly states, and both parties appear to agree, that whether to permit new issues on retrial is a matter committed to the discretion of the trial court. *See* Plaintiffs' Reply Brief at 2.

With the guidance of *Habecker II* in mind, the court will address whether plaintiffs should be permitted to go forward with these additional theories or not.

A. *The 1983 and 1984 Leases*

Plaintiffs argue that this issue was pled in their First Amended Complaint, in ¶¶ 7-8 ("Forklifts was engaged in . . . the rental, leasing, and maintenance of forklifts") and ¶ 15 ("The defect(s) in said forklift existed at the time it left defendant Forklift's control"). Citing *Francioni v. Gibsonia Truck Corp.*, 472 Pa. 362, 372 A.2d

736 (1977), plaintiffs point out that Pennsylvania law extends strict liability to all suppliers of a product engaged in the business of supplying products for consumption by the public—a group which would include, in the present circumstances, Forklifts. Plaintiffs then argue that

> [i]t would be highly prejudicial to plaintiffs if they were not permitted to raise this issue upon retrial, as the facts now known and established show clear liability against Forklifts under Pennsylvania products liability law, and it is clearly in the interests of justice to allow plaintiffs to raise this issue upon retrial.

Plaintiffs' Brief in Support of Motion to Allow Issues to Be Raised Upon Retrial at 18.[2]

Defendants contend 1) that plaintiffs withdrew with prejudice the leases issue prior to the first trial and that 2) Forklifts relied on that withdrawal to its detriment by voluntarily dismissing the United States and the Army as third party defendants when it appeared that Forklifts would have no independent liability.

Plaintiffs dismiss this assertion as "patently false," and states that "[a]ll plaintiffs did . . . was to withdraw their negligence claims against all defendants and elect to proceed on their strict liability claims only . . . . Forklifts then, on its own, a few minutes later, stipulated to dismiss its third party claim against the United States. *See* Reply Brief at 5.

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[2] The court notes that plaintiffs cite 5 Am.Jur.2d, Appeal and Error, § 955, at 382, in support of their position: "*The case may be retried in the light of knowledge acquired since the former trial, ...*" Brief in Support at 18 n. 2 (emphasis added by plaintiffs). The court is not certain how this authority is relevant to the issue of the leases, as plaintiffs acknowledge in their brief that they could have pursued this issue at the first trial, but did not do so "for tactical reasons." Plaintiffs have not described any evidence acquired after the first trial which would make the claims on the leases more desirable to pursue at this third trial.

The court disagrees with plaintiffs' characterization of Forklift's stipulation to drop the third party defendants from the case. This action was obviously precipitated by the fact that no direct claims were being pursued against Forklifts just prior to trial, and that Forklifts therefore had no need to over-complicate this case with needless parties. To permit plaintiffs to pursue the lease claims now would work an extreme prejudice on Forklifts due to its reliance on plaintiffs' actions and representations prior to the first trial. To the plaintiffs' side of the balance sheet, the court can discern no new facts or law which have come forward since the end of the first trial which would make pursuing the leases issue any more desirable now as opposed to then, which might militate toward admitting the lease claims.

Accordingly, due to the prejudice suffered by Forklifts in reliance on plaintiffs' initial decision not to pursue the leases theory at the first trial, the court will not permit the introduction of this theory into the upcoming trial.

B. *The Post-Sale Duty to Warn*

Plaintiffs state that they did not pursue this theory at first trial due to their mistaken belief that it had been precluded by this court's rejection of the retrofit argument.

Plaintiffs argue that Pennsylvania law on this issue has been settled by the Pennsylvania Superior Court in *Walton v. Avco Corp.*, 383 Pa.Super. 518, 557 A.2d 372 (1989), *app. granted,* 524 Pa. 594, 568 A.2d 1245 (1989), which, they represent, held that lack of a post-sale warning could establish strict liability. Conversely, defendants posit that *Walton* is an anomalous decision and should not be followed as the law of Pennsylvania by this court.

Walton v. Avco Corp. was decided in March of 1990, about one month after the close of the first *Habecker* trial, while this case was on its first appeal. The Supreme

Court of Pennsylvania granted defendant's petition for appeal in April 1990; the court has not ruled on that appeal to this date. Plaintiffs state that they opted not to pursue a cause of action for post-sale duty to warn at the first trial because the law was unsettled with regard to whether such the failure to tender post-sale warnings could give rise to a strict liability cause of action and because they felt that such a claim had been ruled out by the court's dismissal of plaintiffs' duty to retrofit argument. Plaintiffs point out, however, that the Third Circuit in *Habecker I* stated in a footnote that this court's ruling on the retrofit issue did not preclude plaintiffs from raising the issue at the first trial. 893 F.2d at 54 n.4.

Walton involved a suit by the estates of two men killed in the crash of a helicopter against the manufacturer of the engine, Avco, and the manufacturer of the finished helicopter, Hughes Aircraft. Hughes had learned from Avco that the oil pumps in the engines of the helicopters were defective. *Walton,* 557 A.2d at 375. Hughes, despite knowing of potentially dire consequences, failed to pass this information on to its customers. The court held that, given the circumstances, Hughes was strictly liable for the failure to issue such warnings.

This court has closely studied the *Walton* opinion and other Pennsylvania jurisprudence on the existence of a post-sale duty to warn and declines to permit plaintiffs in this case to use the *Walton* decision to add such a cause of action for several reasons.[3]

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[3] Although a federal court sitting in diversity jurisdiction may, in determining governing state law, give the decrees of lower state courts some weight, it is not bound by those decisions as it would be by a pronouncement of the state's highest court—here, the Pennsylvania Supreme Court. *Paoletto v. Beech Aircraft Corp.*, 464 F.2d 976, 979 (3d Cir. 1972) (citing *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967)). In fact, in a recent products liability opinion, *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430, 440-44 (3d Cir. 1992), the Third Circuit explicitly refused to follow a Superior Court decision, *Foley v. Clark*

1. Walton vs. Lynch

First, *Walton* appears to be at odds with the decision of another Superior Court panel the year before. In *Lynch v. McStome & Lincoln Plaza Associates,* 378 Pa. Super. 430, 548 A.2d 1276 (1988), a Superior Court panel held that, in a products liability action sounding in negligence, there is no cause of action for a continuing duty to warn purchasers of new developments which may make the product more safe. *Lynch* involved an escalator system at a mall which had allegedly come to an abrupt stop and injured the plaintiff. The trial court refused to admit evidence proffered by the plaintiff indicating that the escalator manufacturer could have notified purchasers of the escalator that a new braking device was available which would have increased the stopping distance of the escalator. The panel upheld the trial court, indicating that they were "unaware of any Pennsylvania precedent that imposes such a broad duty on a manufacturer." *Lynch,* 548 A.2d at 1281.

Plaintiffs argue that *Lynch* is inapposite to the present matter, since the *Lynch* holding specifically addressed the post-sale warning issue only as it applies to negligence, and not strict liability, claims.

The court, however, believes that some of the language in *Lynch* indicates broader considerations than its actual holding might imply. Discussing the nature of a continuing duty to warn, the *Lynch* panel stated:

> The clear effect of imposing such a duty would be to inhibit manufacturers from developing improved designs that in any way affect the safety of their products, since the manufacturer would then by subject to the onerous, and oftentimes impossible, duty

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Equipment Co., 361 Pa.Super. 599, 523 A.2d 379 (1987), and rendered its holding inapplicable to cases within the jurisdiction of the circuit. Accordingly, this court will examine any relevant Superior Court precedent here, but will not give it controlling effect.

> of notifying each owner of the previously sold product that the new design is available for installation, despite the fact that the already sold products are, to the manufacturer's knowledge, safe and functioning properly.

548 A.2d at 1281. Clearly, this language demonstrates that the panel was concerned with the burden manufacturers might face if subjected to liability for failing to follow through in notifying every consumer of their products of design changes. Such reasoning would apply equally, and perhaps moreso, to strict liability claims as opposed to negligence, as liability for failure to notify would be applied without any consideration of plaintiff's or defendant's conduct and without the benefit of defenses such as contributory negligence.[4] In addition, *Lynch* relies heavily on a case from the Appellate Division of the New Jersey Superior Court, *Jackson v. New Jersey Manufacturers Insurance Co.*, 166 N.J.Super. 448, 400 A.2d 81, 89-90 and n.3 (1979), which denied the plaintiff's post-sale duty to warn claims under both § 402A and negligence. *Jackson*, 400 A.2d at 89 ("Whether this claim, essentially one of failure to warn, is viewed as sounding in negligence . . . or strict liability . . . makes no difference.") (citations omitted). The reliance on this language by the *Lynch* panel certainly indicates at least a level of knowledge, and perhaps approval of, the concept that a "post-sale" duty should not be made viable

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[4] It is bewildering to this court why a state would permit the viability of a strict liability but not the harder-to-prove negligence claim, as opposed to the reverse. Plaintiffs themselves implicitly acknowledge this point in their reply brief, noting that Michigan is, with "100% certainty," a "negligence only jurisdiction" because it is a "state so dominated by the auto manufacturers." Plaintiffs' Reply Brief at 12. Permitting strict liability post-sale warning claims only, however, as the *Walton* case establishes for Pennsylvania, protects no one—manufacturers are faced with the possibility of strict liability while injured parties cannot pursue negligence claims as an alternative cause of action.

in either negligence or strict liability on public policy grounds.

The *Walton* panel does not even discuss *Lynch,* however, and proceeds as if the broad public policy language in that case does not exist.

2. Nature of Plaintiffs' Claim

This court is also troubled by the fact that the substantive nature of the claim involved in *Walton* differs from that being pursued in the present matter. As the court understands plaintiffs' claim here, they contend that defendants had a duty, when Clark began to produce new forklifts (and to retrofit older models) with restraining devices in 1983, to issue warnings to the users of older forklifts that they may not be as safe without such devices. The failure to do so thus rendered the forklifts unsafe in violation of § 402A. *See* Plaintiffs' Pretrial Memorandum at 19-20 (Nov. 25, 1988) (Third Circuit Appendix at 86a-87a) (in the alternative to liability for failure to retrofit, defendants should be liable for "failure to advise the users of the forklifts to discontinue use of Clark forklifts pending installation of the Clark operator restraint system").

The allegations in *Walton,* conversely, dealt with a defective component which went out as part of a finished product, rendering the product unsafe for use when it left the manufacturer. The component fabricator learned of the defect and warned the manufacturer, who then failed to warn the final consumer of the product. The *Walton* panel held that the manufacturer could be held strictly liable "for the defective nature of the helicopter when it failed to warn of the defects in the design of the helicopter's engine which were discovered and publicized after the sale of the aircraft." Here, the claim, as framed in plaintiff's pretrial memorandum, appears to intimate that the "post-sale" strict liability claim arose when Clark and Forklifts became aware that restraints

could be installed and failed to inform consumers of the product to discontinue use unless the devices were put in place.

This court sees a qualitative difference between a "defect" such as the absence of restraints here, which is patent, and the latent, internal defect such as the one in the helicopter engine in *Walton*. Moreover, the risk involved in the present case came not from the normal everyday use of the product, as with the oil pump in *Walton*, but instead arose from the increased danger of injury should a rollover occur.[5] The court does not see this as a situation where the forklift contained a structural defect in, say, one of its axles which, over time, might cause it to crash. Instead, Clark had developed a harness which it felt would make the forklift safer and had begun to install it on newer models.[6] While this court is aware that, to establish a strict liability claim the defect need not be latent, the court is nevertheless wary of extending *Walton*'s novel cause of action past its facts given these considerations.

3. Subsequent Interpretations

An additional factor which would militate the court toward a narrow reading of *Walton* is the fact that this court has not found and plaintiffs have not cited, in either Pennsylvania state or federal courts, has actually permitted a plaintiff to recover under the *Walton* "post sale duty to warn" holding.

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[5] There is no dispute that, absent the two theories plaintiff is attempting to pursue here, the only remaining issue in the case is whether the forklift was "crashworthy" without the restraint system. *See Habecker II*, 942 F.2d at 213.

[6] In this manner, the facts here are closer to those of *Lynch* than to those of *Walton*, which makes the public policy concerns voiced in *Lynch* that much more relevant to this case.

4. Walton Caveat

Last, the court is concerned with the caveat written into *Walton* itself. Cognizant of the practical difficulties that the imposition of this new duty would mean to sellers and manufacturers of goods, the *Walton* panel stated that "boundaries must indeed be recognized" and that the social policy that "assures . . . product manufacturers and sellers that they will not become the effective insurers of their products." The court continued, "In our desire to compensate the persons who have been injured by defective products, we should not be willing to impose upon product suppliers legal duties that are unreasonable, and therefore, effectively unobtainable." 557 A.2d 372. The panel stated clearly that its decision related to "a unique and costly product," and not "a household good, commonly found in almost any home in this country." *Id.* at 379.

With regard to the present situation, the court notes that, while forklifts are not common household goods, they are certainly much more prevalent than helicopters. Nearly any business which has a loading dock or a warehouse has a forklift, and it does not stretch the boundaries of imagination to envision frequent inter-business transfers of this type of equipment. Accordingly, with the *Walton* panel's own warning in mind, this court is not willing to extend that doctrine to common business appliances such as forklifts. *See Estate of Rapp. v. Clark Equip. Co.*, slip op., No. G88614CA7 (W.D.Mich.1989) (holding that duty of forklift manufacturer to notify of safety improvements was unreasonably burdensome).

5. Conclusion

The *Walton* decision is the sole decision to which plaintiffs may point as establishing a post-sale duty to warn on the part of manufacturers. At this point, however, that decision appears to be at the very least in a state of confusion. Given this, and absent further guidance from

any other Pennsylvania court, this court in its sound discretion is not willing to extend the cause of action provided to the plaintiff in *Walton* past its own facts and to plaintiffs here for the purposes of retrial.[7]

II. "Motion for Partial Summary Judgment and/or to Preclude Defendants from Withdrawing Judicial Admission and Sitpulation and From Raising Formerly Withdrawn Issue at Retrial"

Through this motion, plaintiffs essentially request that the court prevent defendant Clark from withdrawing several admissions made by their attorneys prior to and at the second trial.

First, plaintiffs point to a colloquy in chambers on June 18, 1990, where the issue of whether physical restraints could have been installed on the forklift when it left the Clark factory in 1977.

> THE COURT: I want to go over some matters so we know the groundwork that we're operating under.
>
> First of all, do the Defendants contest the issue of feasibility? Is that an issue in the case or not?
>
> MR. HOLLSTEIN: Putting the system on?
>
> THE COURT: Right.
>
> MR. HOLLSTEIN: We don't contest that.
>
> THE COURT: So that's not an issue?

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[7] The court of course realizes that the Pennsylvania Supreme Court, while this matter is pending, may shed some light on the state of the post-sale duty to warn when it rules on the *Walton* appeal. In the interests of sound judicial administration, this court is not inclined to wait for the Supreme Court, as it has already been nearly two years since the appeal was taken and no decision has yet been issued. Moreover, according to plaintiffs' reply brief, the post-sale duty to warn issue is not even being contested on appeal, and thus the murky situation with which this court is faced may be present for some time.

MR. HOLLSTEIN: That's right.

MR. BOYCHUCK: The mere installment of the hardware as opposed to . . .

THE COURT: The feasibility that a system is available.

MR. BOYCHUCK: As opposed to any agreement that that . . .

THE COURT: Whether or not that system is adequate is another issue.

Transcript, In Chambers Conference, at 3 (June 18, 1990).

At the trial, counsel for defendant Clark noted, in response to a motion to exclude the computer modeling evidence, that:

> First of all, with regard to the feasibility issue, early on in the case we stipulated that it would have been physically possible to put a seat belt or wings on the forklife earlier on.

Later, Clark's lawyer and the court had this exchange:

> THE COURT: With regard to the technical feasibility issue, as I understand the theory, the technology goes not to whether or not a seatbelt could be put on but, in essence, whether or not the equipment would become defective with a restraint system, and until the technology was available to test the effect putting a seatbelt on I think goes to the issue of whether there was a defect, and I want the Defendants to make it perfectly clear to the jury in their closings that you don't contest the feasibility of putting a seat restraint system in.
>
> MR. HOLLSTEIN: I have no objection if Your Honor would like to tell the jury in your charge that we don't contest the fact that a belt or wing could physically have been put on.

Trial Transcript at 29-30 (page 688a, Third Circuit Appendix). Last, in his closing, defense counsel argued:

> MR. HOLLSTEIN: And then we get to Clark's program. And you may have heard Mr. Miller say oh, it was feasible to put a seatbelt on the forklift in '77. It was feasible to put a wing on. Sure. Seatbelts have been around. They could have thrown a seatbelt on the forklift. What would it have cost, nickles and dimes to put a seat belt on? But the point is not trying to cover yourself in litigation or doing what seems to be the simple thing. The question is what is best for the forklift operator.

Trial Transcript, Volume VIII, at 85 (June 25, 1990).

In *Habecker II*, the Third Circuit panel appeared to read these statements as establishing an admission that some type of restraint device could have been installed in 1977: "Clark has conceded that an operator restraint system would have been feasible in 1977. Therefore, in order to determine whether the forklift was 'defective,' the only question for the jury was whether an operator restraint system is an 'element necessary to make [a forklift] safe for its intended use. . . .'" *Habecker II*, 942 F.2d at 216 (citation omitted).

Plaintiffs argue that defendants should be bound to these admissions at the third trial, and should not be permitted to litigate the feasibility issue. Defendants in turn contend that any admissions made at the second trial were for the limited purpose of stipulating that "if this operator restraint system existed, it would have been physically possible to install this system on the forklift in 1977." Defendant Clark's Brief in Opposition at 3. "The existence of the system has never been admitted; it was simply not pursued for tactical reasons." *Id.* at 4-5. Clark reasons that whether the restraint system later employed by Clark was "feasible" in 1977 is a question distinct from whether it was "desirable," and thus remains as a defense. *See Habecker II*, 942 F.2d at 215.

In *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir.1972), the Third Circuit reiterated that judicial admissions on issues of fact, including those made by counsel on behalf of a client during a trial, are binding "for the purpose of the case . . . including appeals." Various lower courts have applied this rule against parties, so long as the admission was "unequivocal." *See Childs v. Franco,* 563 F.Supp. 290, 292 (E.D.Pa.1983) (counsel's admission in closing argument that plaintiff had suffered "some injury" was binding); *see also In re Eagson Corp.,* 37 B.R. 471 (Bankr.Pa.1984); *Eureka Investment Corp. v. Chicago Title Ins. Co.,* 530 F.Supp. 1110, 1117 (D.D.C.1982).

The court believes that Clark's admission through counsel at the second trial must be read more broadly than Clark urges. As an initial matter, the court sees no equivocation in Clark's admission. However, the court is not willing to give these admissions as wide a scope as plaintiffs would like. As the court reads the various statements, defendant Clark has conceded that the installation of *some type of restraint system* was feasible in 1977. The nature of such a system, as characterized by defense counsel, would be some sort of a "seatbelt" or some sort of a "wing." The court will therefore limit any stipulation or admission which would carry over to this third trial accordingly.

The court also holds that Clark's admission does not apply to Forklifts. Plaintiffs have not shown any identity between the two parties, nor have they cited any authority which would lead this court to believe that any admission by Clark is binding on Forklifts, a separate entity which is merely a co-defendant with Clark in the action. However, as a practical matter, it seems to the court that Forklifts, as purchaser and lessor of the forklift in 1983 and 1984, would be hard put to deny such an admission by the manufacturer Clark with regard to what was feasible when the forklift was produced.

III. "Motion for Partial Summary Judgment as to Product Defect"

Plaintiffs ask that the court grant summary judgment on the holding that the forklift was defective for lack of an operator restraint when it left the Clark factory in 1977. Plaintiffs cite 1) the admission discussed in the previous section; and 2) the videotape "Live to Tell About It" which explains the addition of an operator restraint system to Clark forklifts in the early 1980s, as establishing that there is no genuine issue of material fact present here as to whether the forklift was defective.

The standards for the award of summary judgment under Federal Rule of Civil Procedure 56 are well known. As the Third Circuit Court of Appeals recently capsulized:

> Summary judgment may be entered if "the pleadings, deposition[s], answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "geunine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Equimark Comm. Finance Co. v. C.I.T. Financial Serv. Corp.*, 812 F.2d 141, 144 (3d Cir. 1987). If evidence is "merely colorable" or "not significantly probative" summary judgment may be granted. *Anderson*, 106 S. Ct. at 2511; *Equimark*, 812 F.2d at 144. Where the record, taken as a whole, could not "lead a rational trier of fact to find for the nonmoving party, summary judgment is proper." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987).

In *Habecker II*, the Third Circuit panel framed the sole jury question for the second trial thusly:

> In this case, Clark has conceded that an operator restraint system would have been feasible in 1977. Therefore, in order to determine whether the forklift was "defective", the only question for the jury was whether an operator restraint system is an "element necessary to make [a forklift] safe for its intended use", *Azzarello v.* [*Black Brothers Co., Inc.*], [480 Pa. 547] 391 A.2d [1020] at 1027 [(1978)], a question to be answered on the basis of all knowledge available at the time of trial.

Habecker II, 942 F.2d at 216.

In response to plaintiffs' motion, defendant Clark rightly points out that simply because Clark had admitted that some type of restraint could be attached in 1977 does not mean that the forklift was unsafe without it. Moreover, the addition of a system at a future date too does not mean that the prior model was defective. Plaintiffs cite not a single case where a court has so held. The issue for trial here as framed by the Third Circuit presents questions for the jury, to be decided on the basis of expert testimony and any other admissible evidence. *See* Trial Transcript, Volume VII, at 46 (Exhibit A, Expert Testimony of Entwhistle, stating that the forklift "was not defective when it was manufactured and distributed in 1977 because of the fact that it did not have an operator restraint on it."). Accordingly, the court holds that contested material issues of fact remain and that summary judgment is not appropriate on this issue.[8]

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[8] In their reply brief, plaintiffs indicate that both defendants should be held to have admitted plaintiffs' proposed statement of material facts because they failed to file a counterstatement of facts as required by Local Rule 401.8. While defendants do appear to have overlooked filing their counterstatements, the court is not inclined to grant summary judgment on that basis. This case has been through two trials. The court can safely conclude that defendants do not admit the facts as proffered by plaintiffs.

IV. "Motion to Compel Answers to Interrogatories"

Plaintiffs next request that the court compel defendants to answer certain interrogatories which were first tendered and answered in 1987. These interrogatories, numbered 17 through 20, concerned the existence of other accidents and injuries or other lawsuits involving Clark forklifts. Clark, in answering these four interrogatories, posed various objections and gave a limited answer to interrogatory 17. Until now, five years and two trials later, plaintiffs had not made a formal motion to compel answers to these interrogatories.

The interrogatories in question read as follows:

> 17. Has Clark Equipment Company received notice of injury to any other person as a result of ejection caused by a lateral roll/tip over pertaining to any forklift product manufactured by them, with particular emphasis on the Clark 5000 pound capacity forklift?
>
> 18. If the answer to Interrogatory No. 17 is in the affirmative, please state:
>
> (A) The name and address of the injured party;
>
> (B) The date of the notice; and
>
> (C) A description of the forklift involved.
>
> 19. Has there been other litigation against Clark Equipment Company pertaining to injuries sustained as a result of a lateral roll/tip over related to any of its forklift products, with particular emphasis upon the Clark 5000 pound capacity forklift?
>
> 20. If the answer to Interrogatory No. 19 is yes, please state:
>
> (A) The title and date, court and cause, and name of attorney for plaintiff.

Defendant Clark answered number 17 by objecting to the question as overly broad, contending that it requested information about any type of forklift rollover

accidents, including those involving circumstances very much unlike those in Mr. Habecker's accident. Clark did state, however, that a firm in Palo Alto, California had compiled accident reports and summaries submitted to Clark, and that these would be available for review. Plaintiffs never apparently attempted to review these files. Clark answered the remaining questions by referring plaintiffs to answer number 17.

Plaintiffs state that their new local counsel hired for the second trial, Hy Mayerson,[9] pointed out that numerous cases were pending against Clark at the time which, they claim, were directly relevant in answering plaintiffs' interrogatories. They further indicate that the emergence of this information shows at the very least bad faith on the part of Clark and should entail essentially reopening discovery on these other cases.

Prior to the second trial, the court, as stated earlier in this memorandum, was bombarded with letters from counsel. This issue was among those discussed in those letters (which were, apparently, part of the record on appeal). In its order of April 27, 1990, the court denied plaintiffs' informal request to compel discovery and impose sanctions on Clark, stating that "[t]he court seriously questions the propriety of [a draft motion for sanctions against Clark] in light of Clark's specific objection to the interrogatories in question, its answer to the portion of the interrogatory it deemed appropriate and plaintiffs' apparent satisfaction with the information by Clark (indicated by plaintiffs' failure to file a motion to compel at the appropriate time)."

Plaintiffs argue that the Third Circuit in *Habecker II* essentially has directed this court to reopen discovery, citing the following passage:

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[9] Whose name, plaintiffs state, they discovered in an advance copy of the article "Defective Forklift Truck" in 3 Am.Jur. Proof of Facts 3d 615, where Mr. Mayerson was thanked by the author for his assistance in providing information with regard to various ongoing forklift suits.

> [I]n order to determine whether the forklift was "defective", the only question for the jury was whether an operator restraint is an "element necessary to make [a forklift] safe for its intended use", . . . a question that is to be answered on the basis of *all the knowledge available at the time of trial.* Evidence about what Clark knew or could have known about the desirability of an operator restraint system at the time of manufacture is not relevant to that question.

Habecker II, 942 F.2d at 216 (emphasis added). The magic words, according to planitiffs, are that the question of defectiveness must be answered on the basis of "knowledge available at the time of trial."

The court believes that plaintiffs read the language in that snippet of opinion out of context. As this court interprets the opinion, the Third Circuit is merely referring to the jury's duty to judge whether a product is defective on the basis of knowledge available for presentation at the time of trial. It is not a mandate to reopen discovery every time a case is remanded. A party's continuing duty to update discovery requests will presumably perform the function of keeping the trial current.

Instead, it is clear that the decision whether to reopen discovery or not is within the sound discretion of the trial court. *Habecker II,* 942 F.2d at 218 ("We hold only that the decisions on whether to allow new claims, whether to permit further discovery, and whether to hear additional evidence were all within the District Court's discretion.").

Plaintiffs contend that Clark has abused discovery procedures in other cases in the past and did so when it objected to and gave only limited answers to interrogatories 17 through 20. The court, however, is not sure it sees the relevancy of any alleged discovery abuses in other cases to the matter at hand here—that is, whether Clark should be compelled to answer the contested interrogatories.

Plaintiffs also cite the case of *Gammon v. Clark Equipment Co.*, 38 Wash.App. 274, 686 P.2d 1102, 1107 (1984), *aff'd on other grounds,* 104 Wash.2d 613, 707 P.2d 685 (1985) for the proposition that, even up to the point of trial, if a party does not fully answer discovery requests, discovery must be reopened.

However, unlike *Gammon,* this case has been through two trails already in five years, and plaintiffs are only now, prior to the third trial, attempting by motion to resolve the discovery dispute. Other factors, discussed below, counsel against a wholesale opening of discovery based on *Gammon.*

First, the court is of the opinion that Clark was not as forthcoming as it might have been in answering the four interrogatories. The court is not inclined, however, to permit plaintiffs to use the information at issue to reopen full-fledged discovery. It does so for several reasons: 1) If plaintiffs were unsatisfied with the answers given or the information provided, they could have made a motion to compel at any time prior to the first trial; 2) defendant Clark had made available accident reports in 1988, which plaintiffs, for whatever reason, decided not to review; [10] 3) there would appear to be little prejudice to the plaintiff here, as Mr. Mayerson apparently has much of the information requested by plaintiffs in their interrogatories in any event; and 4) as stated in greater depth in the following section of this memorandum the court does not buy the argument that they were denied the opportunity to build a proper case because Clark did not list any other pending litigations in answer to the four interrogatories.

Accordingly, the court will grant to plaintiffs the following relief in response to this motion. Defendant Clark will be ordered to make available all accident reports up to the date of the upcoming trial in this matter, exclud-

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[10] **Plaintiffs essentially admitted this at a telephone conference with the court held March 20, 1992. Counsel for defendant Clark stated that the reports would have been mailed to plaintiff's counsel.**

ing the reports already in the possession of Mr. Mayerson. Clark's counsel has represented to the court that he will stipulate to the authenticity of these reports, thereby relieving plaintiffs of the need to authenticate them at trial.[11] Second, Clark will be ordered to list any lawsuits pending against it involving lateral turnovers and the use of Operating Restraint Systems in Clark Forklifts similar to the one driven by Mr. Habecker as requested in the 1987 interrogatories. Clark is admonished to err on the side of overinclusiveness in answering these requests.

V. "Motion to Permit Discovery and to Allow Additional Evidence to Be Used Upon Retrial"

Plaintiffs propose that the court permit plaintiffs to reopen discovery in numerous areas for an additional 90-120 day period. The areas they would delve into include additional depositions, explanations of various documents and testimony, discovery regarding expert witnesses in other Clark-related litigation, and other areas. *See* Motion at 10-11. Plaintiffs have further indicated their desire to call new expert witnesses at trial.

As stated in the previous section, whether to reopen discovery is committed to this court's sound discretion.

Plaintiffs attempt to use the interrogatory answers discussed in the previous section as a crowbar to pry open discovery for the entire case. Clark's "failure" to properly answer the interrogatories, goes the argument, has put plaintiffs at a grave disadvantage in uncovering appropriate expert witnesses and other evidence. Plaintiffs contend that only through the sheer serendipity of their discovery of Mr. Mayerson prior to the second trial were they able to see the wide vista of their case, and that they now should be able to explore this new vista.

The court is not convinced by this argument. Certainly there are many ways to find appropriate local counsel, relevant evidence and competent experts other than re-

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[11] A question remains regarding the admissibility of such statements because of hearsay restrictions.

viewing the files of other pending litigation against the defendant supplied by defendant. That plaintiffs did not engage in more diligent discovery prior to the close of discovery does not militate toward permitting them to essentially recraft their case on the eve of retrial.[12]

Moreover, as stated in the previous section, plaintiff could have through motions resolved discovery disputes well before the litigation was as far advanced as it is now. The court is not willing at this late date to open discovery wide and essentially reshape this case, putting defendants, which have relied on this court's prior rulings, to significant expense and effort essentially because plaintiffs were not particularly thorough in building their case originally.

It is this court's opinion that this case should proceed through the third trial in essentially the same form as the first two trials, subject, of course, to the Third Circuit's admonitions in *Habecker I* and *Habecker II*. The court will therefore deny plaintiffs' motion to reopen discovery except as authorized in the preceding section of this memorandum.

An appropriate order will be filed.

ON MOTION TO RECONSIDER

Before the court is Plaintiffs' Motion for Reconsideration of the portion of this court's Memorandum and Order of March 31, 1992 relating to the existence of a post-sale duty to warn in Pennsylvania. The motion has been fully briefed and is ripe for consideration.

Background

The facts of this case have been recited at length in several opinions by both this court and the Third Circuit

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[12] For instance, plaintiffs propose to replace Mr. Brandt as an expert because he was so badly impeached at the second trial. Mr. Brandt, of course, had been excluded by this court at the first trial because of his lack of qualifications and was subsequently reversed by *Habecker I* for doing so.

Court of Appeals, and the court sees no need to recount them again except to provide context to the present motion.

Following two trials in this court and two remands of this matter from the Third Circuit Court of Appeals [1], Plaintiffs requested that this court permit them to pursue a new claim based on a "post-sale duty to warn" at the pending third trial. Such a claim had not been previously pled or tried in either of the previous trials. Plaintiffs bottomed this new claim on a case, *Walton v. Avco Corp.*, 383 Pa.Super. 518, 557 A.2d 372 (1989), which had been announced by the Pennsylvania Superior Court approximately one month after the defense verdict in the first trial. In *Walton,* the Superior Court ruled that the manufacturer of a helicopter had a duty to warn end users about a defective component in the engines of a line of helicopters after it learned of the defect from the maker of the engine.[2]

Upon motion by Plaintiffs, this court in its discretion declined to permit Plaintiff to pursue a post-sale duty to warn theory at the upcoming third trial. It did so for four reasons: 1) the *Walton* Superior Court opinion appeared to conflict with *Lynch v. McStome & Lincoln Plaza Associates,* 378 Pa.Super. 430, 548 A.2d 1276 (1988), an earlier Superior Court case addressing the post-sale duty to warn; 2) the court found substantial

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[1] The two Third Circuit opinions are: *Habecker v. Copperloy Corp.*, 893 F.2d 49 (3d Cir.1990) (*Habecker I*) and *Habecker v. Clark Equipment Co.*, 942 F.2d 210 (3d Cir.1991) (*Habecker II*). This court's decision on the six motions filed after the Third Circuit's second mandate issued is *Habecker v. Clark Equip. Co.*, 797 F.Supp. 381 (M.D.Pa.1992) (*Habecker III*).

[2] Plaintiffs did try to include a post-sale duty to warn claim in the second trial. The court demurred, stating that it was bound to retry the case only on the issues included in the Third Circuit's mandate. In its second opinion in this case, the Third Circuit corrected this assumption: it is within the district court's discretion as to whether to permit a new issue to be pursued at retrial. *See Habecker II*, 942 F.2d at 218.

differences between the nature of the claims of the *Walton* plaintiffs and Plaintiffs here; 3) the *Walton* case was the only federal or state court case in Pennsylvania recognizing the duty; and 4) the Superior Court itself in *Walton* issued a *caveat* as to breadth of the duty—it was to apply to "unique and costly products" and not "household goods,"; in this court's opinion, forklifts, unlike helicopters, tend toward the common product side of the spectrum.

On May 22, 1992, some two years after the defendants' appeal was initially granted, the Pennsylvania Supreme Court handed down a decision affirming the decision of the Superior Court on the issue of post-sale duty to warn. *Walton v. Avco Corp.*, —— Pa. ——, 610 A.2d 454 (Pa.1992). A month later, Plaintiffs here filed the Motion to Reconsider now before the court, arguing that the Pennsylvania Supreme Court's opinion, which binds this court, sitting in diversity, as precedent, necessitates the vacation of this court's prior decision not to permit plaintiff to pursue the post-sale failure to warn issue on retrial.

Discussion

As an initial matter, the court wishes to underline the procedural footing of this motion. The court is not in a position where it is deciding a motion to dismiss prior to trial; instead, the court is merely weighing whether or not, in its discretion, it believes that Plaintiffs should, going into a retrial, be permitted to pursue a cause of action which had been neither pled nor pursued at the prior trial. *See Habecker II,* 942 F.2d at 218; *Habecker III,* at 384.

As pointed out by defendant Clark, the Supreme Court decision in *Walton* arguably renders invalid two of the court's four justifications—numbers one and three—for denying Plaintiffs permission to proceed with a post-sale failure to warn claim. The highest court in Pennsylvania has spoken on the issue: there is no doubt that a post-sale failure to warn claim exists in some capacity in Pennsyl-

vania.[3] Accordingly, to the extent that the *Lynch* decision is at odds with the supreme court's *Walton* opinion, it is trumped.

Factors two and four cited by the court in the March 31, 1992 opinion still apply, however, and militate against permitting Plaintiffs to move forward with a post-sale failure to warn claim here. First, as noted in the March 31 opinion, the court sees a qualitative difference between an open and obvious "defect" such as the lack of restraints involved here, and a latent defect like the engine component in *Walton*. *See Habecker*, at 387-388. Second, echoing the Superior Court, the Pennsylvania Supreme Court noted that

> [T]he peculiarities of the [helicopter] industry also go far to support this imposition of responsibility. Helicopters are not "ordinary goods." By their nature they are not the types of objects that could get swept away in the currents of commerce, becoming impossible to track or difficult to locate. Helicopters are not mass-produced or mass-marketed products; to the contrary, they are sold in a small and distinct market. Additionally, establishments that service helicopters are convenient and logical points of contact. Even more important, in this case, the manufacturer of the crucial component part remained in contact with Hughes for the very purpose of keeping Hughes current on all pertinent information.

Walton, —— Pa. ——-——, 610 A.2d 454. Clearly, the supreme court was, in acknowledging a post-sale duty to warn, cognizant of the dangers of opening the floodgates of litigation with regard to common products which are purchased, transferred and traded with some frequency and thus nearly impossible to monitor. In its previous commentary on this point, this court stated that it was inclined to place forklifts on the "common" end of the

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[3] The court discussed the facts of *Walton* at length in its previous memorandum, and will not reiterate them here.

spectrum, and therefore the *Walton* holding did not apply to this matter. *Habecker III*, at 387-388. In its brief, Plaintiffs do not even address this point.

Accordingly, the court, exercising its sound discretion, is of the opinion that its decision not to permit Plaintiffs to pursue a post-sale failure to warn claim in the third trial was not in error despite the recent pronouncement of the Pennsylvania Supreme Court in *Walton v. Avco Corp.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-7177

CONNIE L. HABECKER, ETC., *et al.*,
Appellants

VS.

CLARK EQUIPMENT COMPANY; FORKLIFTS, INC.

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE and SEITZ,* *Circuit Judges.*

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circiut judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Oct. 14, 1994

---

* Senior Circuit Judge Seitz voted only as to panel rehearing.

[Filed Feb. 12, 1993]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Case Number: 1:CV-86-0352

CONNIE L. HABECKER, Individually and as Personal Representative of the Estate of JOHN R. HABECKER, Deceased; and JOHN MICHAEL HABECKER, Minor, by CONNIE L. HABECKER, his Parent, Natural Guardian and next friend

v.

CLARK EQUIPMENT COMPANY and FORKLIFTS, INC.

JUDGMENT IN A CIVIL CASE

☒ *Jury Verdict.* This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that in accordance with the jury verdict rendered by special interrogatories on February 11, 1993, pursuant to Rule 49(b), F.R.C.P., judgment be and hereby is entered in favor of the defendants and against the plaintiffs.

The above judgment is hereby approved and the Clerk shall enter same of record.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
Chief Judge
U.S. District Court

LANCE S. WILSON
Clerk

/s/ Terry J. Miller
(By) Deputy Clerk

Date February 12, 1993

FILED
FEB 14 1995

No. 94-1060

In The

Supreme Court of the United States

October Term, 1994

CLARK EQUIPMENT COMPANY and FORKLIFTS, INC.,

Petitioners,

v.

CONNIE L. HABECKER, Individually and as Personal Representative of the Estate of JOHN R. HABECKER, Deceased, and JOHN MICHAEL HABECKER, Minor, by CONNIE L. HABECKER, his Parent, Natural Guardian, and Next Friend,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GERALD F. POSNER
(Counsel of Record)
SAMUEL POSNER
POSNER, POSNER AND POSNER
712 Penobscot Building
Detroit, Michigan 48226
(313) 965-7784
Attorneys for Respondents

Of Counsel:

HY MAYERSON
MAYERSON, MUNSING,
CORCHIN & ROSATO, P.C.
3540 Schuylkill Road
Spring City, PA 19475
(610) 948-4800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE EVIDENTIARY ERROR CONSTITUTED REVERSIBLE ERROR WHEN THE ERROR CAUSED THE ENTIRE TRIAL TO BE SO PERMEATED WITH INADMISSIBLE EVIDENCE THAT THE ENTIRE FOCUS OF THE TRIAL WAS CHANGED FROM THE RELEVANT ISSUE OF THE DEFECTIVENESS OF THE PRODUCT TO THE IRRELEVANT ISSUE OF THE REASONABLENESS OF DEFENDANTS' CONDUCT, IN CONTRAVENTION OF SETTLED PENNSYLVANIA LAW?

II. DOES EVIDENCE WHICH IS INADMISSIBLE BECAUSE IT IS IRRELEVANT, AND BECAUSE IT CONFUSES THE ISSUES AND MISLEADS THE JURY, BECOME AUTOMATICALLY ADMISSIBLE JUST BECAUSE IT COMES OUT OF THE MOUTH OF AN EXPERT?

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No. 94-1060

In The

Supreme Court of the United States

October Term, 1994

CLARK EQUIPMENT COMPANY and FORKLIFTS, INC.,

Petitioners,

v.

CONNIE L. HABECKER, Individually and as Personal Representative of the Estate of JOHN R. HABECKER, Deceased, and JOHN MICHAEL HABECKER, Minor, by CONNIE L. HABECKER, his Parent, Natural Guardian, and Next Friend,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioners are seeking a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Third Circuit in what shall be referred to herein as *"Habecker III"*. The three opinions of the Third Circuit in the *Habecker* trilogy, with their full citations and reference to the location in Petitioners' Appendix where the opinions can be found, are set forth below for easier reference:

Habecker I	*Habecker v. Copperloy Corp.*, 893 F.2d 49 (3rd Cir. 1990) [App. 40a-49a].
Habecker II	*Habecker v. Clark Equipment Co.*, 942 F.2d 210 (3rd Cir. 1991) [App. 25a-39a].
Habecker III	*Habecker v. Clark Equipment Co.*, 36 F.3d 278 (3rd Cir. 1994) [App. 1a-24a].

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Federal Rules of Evidence 401, 402 and 403, as amended, provide as follows:

Rule 401. Definition of "Relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible. Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

A. Overview.

This is a strict liability products liability case arising under Pennsylvania state law, and the rule of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) applies. The disposition of this case neither revolves around nor focuses upon any of the issues raised by petitioners but instead focuses upon the issue of relevance, *i.e.*, what evidence is relevant in a Pennsylvania strict products liability case.

The entire trial in *Habecker III* was so completely permeated with evidence which is inadmissible in a Pennsylvania strict products liability case because it is irrelevant to the issues to be tried that it impermissibly and prejudicially changed the central focus of the entire trial. Under the facts and circumstances of the instant case, the claimed issue of what standard an appeals court should use in gauging whether evidentiary error is harmless is a non-issue, for the error was so pervasive and so central that it was clearly reversible error no matter what

standard was employed – even if plaintiffs were required to prove prejudice beyond a reasonable doubt!

As will be discussed in more detail in Section C of this Statement of the Case, under Pennsylvania strict products liability law, a manufacturer is held liable for a defect in a product, such as a failure to install a necessary safety device, even if the manufacturer has exercised all possible care in designing and manufacturing the product and even if the defect was not known or could not have been known or anticipated at the time of the product's design and manufacture. Thus all evidence which bears on the manufacturer's knowledge at the time of the product's design and manufacture and which bears on the reasonableness of the manufacturer's conduct, including evidence of what the manufacturer knew or could have known, knowledge of the desirability of particular safety devices, the state of the art, including what others were doing and any concerns they had in making their own design choices, any industry standards or regulations, any technology or research data, and so forth, is wholly irrelevant, for it impermissibly brings negligence concepts into the case and has a strong likelihood of diverting the jury's attention from the product to the reasonableness of the manufacturer's conduct in choosing its design.

Petitioners have not been honest and forthright in their Statement of Facts when stating that this case was and is not a close case because three defense jury verdicts were rendered. The plaintiffs have yet to receive one fair trial, a trial free from the impermissible and inadmissible negligence-type evidence and a trial in which the focus of the trial is properly on the defectiveness of the product

rather than the reasonableness of the manufacturer's conduct. That a jury may have been so diverted from the real and relevant issue by the massive amounts of irrelevant evidence improperly admitted and the arguments of counsel thereon, and may have felt that the manufacturer exercised reasonable care or even all possible care, *i.e.*, was not negligent, has no bearing whatsoever on the issue of whether the product was defective for failure to incorporate the necessary safety device of an operator restraint system. Indeed, the real, primary purpose of all of the improper evidence introduced by defendants was to divert the jury's attention away from the product and toward the reasonableness of the manufacturer's conduct, because while it could win a negligence case, it could not win a strict liability case in which the product itself was on trial.

What occurred at all three trials is that defendants were permitted to permeate the entire trial with evidence which was and is absolutely irrelevant and absolutely inadmissible under Pennsylvania strict products liability law and to permeate it so completely that the entire focus of the trial was changed from that which was permissible to that which was legally irrelevant. Each time the evidence was permitted under a different guise or theory. Each time the evidence was allowed through the back door where its admission through the front door was clearly prohibited. When the front door was shut, defendants went through the back door, then in the next trial through the side door, and then in the last trial through the attic skylight, to get all of the inadmissible negligence-type evidence in somehow, and, with a sympathetic trial court which believes, and has even stated on

the record, that Pennsylvania strict products liability law, as embodied by the decisions of the Pennsylvania courts and the Third Circuit, is unfair, illogical, contrary to common sense, and just plain wrong, and that such impermissible evidence belongs in a strict products liability case, it succeeded. Now that defendants have had their hands slapped a third time, they would have this Court reward their deliberate interjection of impermissible and inadmissible evidence into the trial despite the fact that the evidence impermissibly turned the entire focus of the trial to negligence concepts. Furthermore, defendants would have this Court adopt the novel concept that evidence which is inadmissible because it is absolutely irrelevant is somehow rendered automatically admissible just because the irrelevant evidence comes out of the mouth of an expert, a proposition that would turn the entire concept of relevant evidence on its ear.

Because of the nature of the issues to be decided, respondents shall now include, within this Statement of the Case, a brief review of the facts, a brief review of Pennsylvania strict liability products liability law, and a brief review of all three *Habecker* trials and decisions insofar as they are relevant to the issues raised by defendants-petitioners.

B. Facts.

The facts giving rise to this products liability action are simple, and were recited by the court in *Habecker III* (App. 2a):

> "John Habecker was a civilian employee of the New Cumberland Army Depot when the

> forklift he was backing down a ramp tumbled from the side of the ramp. Thrown from the forklift, Habecker was tragically killed when the forklift fell on top of him. The forklift was manufactured in 1977 by Clark Equipment Company and was not designed with an operator restraint system (ORS), nor had one subsequently been installed.
>
> "Habecker's estate and family ('Habecker') brought a products liability action . . . against Clark and Forklifts, Inc., the corporation that leased the forklift to the Army, alleging that the forklift was defective due to the lack of an ORS, for example, a seat belt."

For this Court's edification, an operator restraint system ("ORS"), may consist of merely a seat belt or, most often, consists of a seat belt and some type of wings or hip restraints on the seat. Each alone helps to confine the forklift driver so that he is not ejected, and seriously injured or killed, in a forklift turnover. The combination of the two is a system which together greatly increases the safety of the forklift by greatly increasing the chance that the forklift driver is not ejected.

All major manufacturers now equip their forklifts with an ORS as standard equipment. Clark has done so since 1983 when it also offered to retrofit all of its existing forklifts with an ORS for free. Despite its attempts to shroud its ORS in mystery, it was and is a rather simple device. It consists merely of a seat belt which fits a little less snugly than an auto seat belt (not as a safety factor but for ease in operation, as a snug belt will also keep the driver from falling out), and wings on the seat which are placed at shoulder level, so visibility will not be

impaired. Clark produced advertisements touting the safety benefits of its ORS and urging forklift owners to retrofit their forklifts with the ORS, as well as two videos, to which the court in *Habecker II* and *Habecker III* referred, which both specifically showed and stated that ORS are necessary safety devices which are effective and which work and that Clark can prove it, contrary to its rather bizarre position at trial that an ORS, including its own ORS, is not really an effective safety device and can cause more injuries than it prevents. Clark's own expert, Entwisle, testified at trial that Clark's current position is that the operator ought to be restrained, and conceded that while some ORS are more effective than others, all ORS are effective. In fact, since 1983, there is not a single known instance of a restrained operator being crushed and killed in a forklift lateral overturn.

C. Pennsylvania strict liability law.

An overview of Pennsylvania's strict liability product liability law was set forth by the court in *Habecker III* (App. 6a-7a, 13a) and in *Habecker II* (App. 28a-29a, 33a-34a), and will be supplemented herein, for it is central to an understanding of the issues involved in this case, and to an understanding of the *Habecker II* and *Habecker III* decisions which shall be set forth and discussed in the next section.

This Court is also referred to the history and development of Pennsylvania product liability law set forth in *Hammond v. International Harvester Co.*, 691 F.2d 646, 649-650 (3rd Cir. 1982) and *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430, 435-437 (3rd Cir. 1992).

Under Pennsylvania strict products liability law, a manufacturer is held liable for a defect in a product, such as a failure to install a necessary safety device, even if the manufacturer has exercised all possible care in designing and manufacturing the product, *Berkible v. Brantley Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 898 (1975); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), and even if the defect was not known or could not have been known or anticipated at the time of the product's design and manufacture, *Madjic v. Cincinnati Machine Co.*, 370 Pa.Super. 711, 537 A.2d 334, 337 (1988).

Thus all evidence which bears on the manufacturer's knowledge at the time of the product's design and manufacture and which bears on the reasonableness of the manufacturer's conduct, including evidence of what the manufacturer knew or could have known, knowledge of the desirability of particular safety devices, the state of the art, including what others were doing and any concerns they had in making their own design choices, any industry standards or regulations, any technology or research data, and so forth, is wholly irrelevant, for it impermissibly brings negligence concepts into the case and has a strong likelihood of diverting the jury's attention from the product to the reasonableness of the manufacturer's conduct in choosing its design. The court correctly noted in *Habecker III* (App. 6a) that

> "the Pennsylvania Supreme Court has remained faithful to its view that negligence concepts have no place in a products liability trial. *See, Lewis v. Coffing Hoist Division, Duff-Norton Co., Inc.*, 515 Pa. 334, 528 A.2d 590, 593 (1987)."

Further, the Pennsylvania courts have not allowed a defendant to do indirectly what he cannot do directly by injecting negligence concepts into a strict liability case.

> "What the seller is not permitted to do directly, we will not allow him to do indirectly by injecting negligence concepts into strict liability theory." *Berkible, supra,* 337 A.2d at 899.

In *Carracter v. Colson Equipment Co.*, 346 Pa.Super. 95, 499 A.2d 326 (1985), the court rejected a "state of the art" defense, noting, 499 A.2d at 329, n. 6, that the term "state of the art" for purposes of product liability actions has been given a variety of meanings, including industry custom, government regulatory and licensing standards, or technological feasibility or capability. It held, *supra* at 330-331:

> "(W)e now conclude that ***in the Pennsylvania law of products liability, there is no room for a negligence based defense under the guise of 'state of the art'***. As we have noted above, the term 'state of the art' encompasses various concepts, but ***the common functional feature of all 'state of the art' arguments is that they focus on the knowledge of the defendant and/or the reasonableness of the defendant's conduct rather than on whether the product possessed the design features and/or warnings necessary to make it safe for its intended use.*** Therefore, we conclude that *no magic inheres in the 'state of the art' label* and the 'state of the art' jury charge *should be treated like any other attempt to inject negligence into a product liability case.*" (Emphasis added)

In *Lewis, supra* at 594, the court held that " 'industry standards' go to the negligence concept of reasonable

care and . . . such a concept has no place in an action based on strict liability in tort." In *Madjic, supra,* a judgment was reversed for allowing evidence of ANSI standards. *Accord, Sheehan v. Cincinnati Shaper Co.,* 382 Pa.Super. 579, 555 A.2d. 1352, 1355 (1989), re OSHA standards; and *Santiago v. Johnson Machine and Press Corp.,* 834 F.2d 84 (3rd Cir. 1987), holding that evidence and instruction concerning the technological state of the art, including technology and research data, at the time the product was manufactured constituted reversible error.

The portion of the *Lewis* decision, *supra* at 594, which was quoted extensively by the court in both *Habecker II* (App. 33a) and *Habecker III* (App. 7a) is of the greatest importance to the resolution of this appeal:

> "Having reached the conclusion that ***evidence*** of industry standards relating to the design of the control pendent involved in this case, and evidence of its widespread use in the industry, ***go to the reasonableness of the appellant's conduct in making its design choice,*** we further conclude that ***such evidence would have improperly brought into the case concepts of negligence law.*** We also conclude that ***such evidence would have created a strong likelihood of diverting the jury's attention from the appellant's control box to the reasonableness of the appellant's conduct in choosing its design.*** For those reasons ***we conclude that the trial court correctly ruled the evidence to be irrelevant and hence inadmissible.*** It is well established that ***a trial court should exclude evidence which has a tendency to distract the jury from its main inquiry or confuse the issue.***" (Emphasis added)

D. The *Habecker* trilogy.

All three trials in this case were completely permeated with state of the art, negligence-type knowledge and conduct evidence, over the constant objections of plaintiffs. The entire focus of all three trials was improperly shifted from the defectiveness of the product to the reasonableness of the defendants' conduct in making its design choice, bringing negligence concepts squarely into the trial in contravention of settled Pennsylvania law. In each of the three appeals, this was "Issue I" in plaintiffs' brief to the Third Circuit.

What occurred at the first trial, *Habecker I*, concerning these evidentiary matters, and what was decided by the court in the first appeal, was correctly set forth by the court in *Habecker III* (App. 3a).

What occurred at the second trial, *Habecker II*, concerning these evidentiary matters, and arguments made thereon, was correctly set forth by the court in *Habecker II* (App. 28a, 36a) and *Habecker III* (App. 3a-4a). In *Habecker II*, the Third Circuit again reversed, finding (App. 26a) that "a substantial possibility exists that the inadmissible evidence influenced the jury", and that

> "a substantial possibility exists that the jury ruled for Clark in the mistaken belief that the forklift was not defective so long as Clark could not have known that an operator restraint system would make it safer." (App. 36a).

The trial in *Habecker III* was once again permeated with the inadmissible evidence, this time under a different guise, a guise that it would show that, despite Clark's prior admission of feasibility, the ORS was not really

feasible because Clark had not produced it and therefore it could not have taken it "off the shelf" and put it on the forklift. Much of the evidence which was brought out by defendants' expert Entwisle is outlined by the court in *Habecker III* (App. 11a-12a); defendants were also allowed to use the irrelevant and impermissible evidence to cross-examine plaintiffs' expert. In addition, plaintiffs were prohibited from offering relevant evidence under the threat of opening the floodgates to all of the rest of the clearly irrelevant and inadmissible evidence (*Habecker III*, App. 10a-11a). Entwisle was also permitted to testify in detail as to Clark's alleged careful conduct in studying and producing the safety device, the ORS, the studies and tests he performed at Clark regarding forklift overturns and everything that Clark did in order to study the application of seatbelts on forklifts and to select the safety devices to put on the forklifts, including coming up with the final Clark ORS safety device in 1983 that was patented in 1986 (R. 1506a-1515a). He was also asked questions regarding the American Society of Mechanical Engineers that studies the design and safety of forklifts (R. 1555a-1557a).

In closing argument, defendants carefully reviewed all of the inadmissible evidence and emphasized their very same theme, repeated from *Habecker II*, that in 1977, the knowledge was not available to allow defendants to decide whether or not to put the ORS on the forklift. Defendants argued the concerns which the designers had in 1977 (R. 2045a) and the competing considerations they took into account in making their design choice (R. 2046a). Counsel argued that the forklift industry had acted responsibly (R. 2048a). Defendant then talked about

Clark's task force and the care they used to study the situation and invent the ORS (R. 2055a-2056a):

> "Let's study – let's see how we can balance the question of improving operator safety in a ground level turnover and balance it out against all these concerns that we have talked about. And they studied, and they used all kinds of things to study the situation. . . .
>
> "A company that sets up a task force for three years to study the safety of forklift operators in lateral turnovers, devotes all of that personnel and effort and succeeds in developing the first effective operator restraint system in 1983 which gets patented is something that I believe should be praised. . . . "

The Third Circuit again reversed. It found the evidence, as well as defendants' arguments, irrelevant under Pennsylvania law, and held that the evidence which was admitted "is inadmissible and improperly focuses the jury's attention on Clark's conduct, rather than on the forklift itself", *Habecker III* (App. 12a, 13a, 15a), the very same error which it noted (App. 4a) had caused reversal in *Habecker II* in which

> "We found that there was a substantial possibility that the inadmissible evidence influenced the jury's determination, focusing its attention on Clark's behavior and decision-making rather than on the product's defectiveness."

SUMMARY OF REASONS FOR DENYING THE WRIT

This case does not provide an appropriate vehicle to resolve any perceived conflict in the standard to be used by a federal appeals court in determining whether evidentiary errors constitute reversible error or merely harmless error because the error committed was so pervasive, so central, and so completely changed the entire focus of the trial, that the error was clearly reversible error no matter what standard was employed, even if plaintiffs were required to prove prejudice beyond a reasonable doubt.

Furthermore, the standard used by the Third Circuit, and followed by other circuits, is correct. The Third Circuit is correct both in its verbal formulation of the standard and in the manner in which it is actually interpreted and applied, as evidenced by its decision in *Habecker II* in which it found reversible error because "a substantial possibility exists that the inadmissible evidence influenced the jury".

In addition, petitioners have waived this issue and/or are estopped from raising it because the standard used by the Third Circuit was the standard which petitioners specifically agreed ought to be used.

As to Issue II, this case does not present any issue as to whether expert testimony is governed by the Federal Rules of Evidence or substantive state law, because under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), the trial court is required to make an initial determination as to whether the evidence is relevant. " 'Expert testimony which does not relate to any issue in the case is

not relevant and, ergo, nonhelpful.' " *Supra* at 2795. Since it is undisputable that the evidence introduced by defendants was totally irrelevant under Pennsylvania strict liability law, the mere fact that the irrelevant and inadmissible evidence came from the mouth of an expert did not transform it into admissible evidence. Furthermore, any such evidence, in accordance with settled Pennsylvania authority, diverts the jury from the issue of the defectiveness of the product to the reasonableness of the manufacturer's conduct, and thus confuses the issues and misleads the jury. It would therefore, in any event, be inadmissible under Rule 403.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE EVIDENTIARY ERROR CONSTITUTED REVERSIBLE ERROR WHEN THE ERROR CAUSED THE ENTIRE TRIAL TO BE SO PERMEATED WITH INADMISSIBLE EVIDENCE THAT THE ENTIRE FOCUS OF THE TRIAL WAS CHANGED FROM THE RELEVANT ISSUE OF THE DEFECTIVENESS OF THE PRODUCT TO THE IRRELEVANT ISSUE OF THE REASONABLENESS OF DEFENDANTS' CONDUCT, IN CONTRAVENTION OF SETTLED PENNSYLVANIA LAW.

There is plainly no issue to be decided by this Court. The standard to be used by a federal appeals court in determining whether evidentiary errors constitute reversible error or merely harmless error is not an issue in this case. Even if the standard were to require the plaintiffs to conclusively prove prejudice beyond a reasonable doubt,

and petitioners do not claim such a demanding standard, that standard would easily be met in the instant case.

For the third straight trial, defendants were successful in turning what should have been a trial on the theory of strict liability into a negligence trial. For the third straight trial, the defendants, aided by a trial judge with a stated belief that the state strict products liability law was unfair, illogical, and wrong, and who has now, finally, reassigned this case to a different judge for retrial, deliberately interjected into the trial a massive amount of evidence which was legally irrelevant to the issue of strict liability, that is, whether the product was defective, but which related solely to the irrelevant knowledge, care and conduct of the manufacturer and seller, evidence showing that defendant was a "good boy", that it acted with all possible care in making its design choice, and which defendants emphasized in closing argument. The entire trial was so completely permeated with and focused upon evidence, testimony and argument concerning this state of the art, knowledge and conduct, negligence-type testimony, over the constant objections of plaintiffs' counsel and motions for mistrial, so as to turn the central focus of the entire trial to negligence concepts, in clear contravention of settled Pennsylvania law.

Under these facts and circumstances, it is beyond peradventure that the substantial rights of the plaintiffs were affected. 28 U.S.C. § 2111. Just as in *Habecker II*:

> "a substantial possibility exists that the jury ruled for Clark in the mistaken belief that the forklift was not defective so long as Clark could not have known that an operator restraint system would make it safer." (App. 36a)

Indeed, there can be no doubt that defendants wanted to try a negligence case rather than a strict liability case and they did everything in their power to do so. A negligence case was the only case the defendants could win, because they could present evidence that they acted reasonably in light of the knowledge available to them in 1977, but it is apparent that they were afraid to try a strict liability case because it would be difficult if not impossible, under the facts and properly admitted evidence, for them to establish that the forklift, which was not equipped with the necessary safety device of an ORS, was not defective. Having brought in all of the negligence-type evidence and argued negligence concepts for the express purpose of prejudicing plaintiffs' strict liability case, and having succeeded in accomplishing their objectives, it is nothing short of incredible that defendants can argue, with a straight face, that plaintiffs' substantial rights were not affected under any formulation of the standard to be employed.

The evidence was and is clearly irrelevant. "Evidence which is not relevant is not admissible." Fed. R. Evid. 402. Furthermore, the words of the Pennsylvania Supreme Court in *Lewis, supra,* should haunt petitioners, quoted as they were in both *Habecker II* and *Habecker III.*

> "[E]vidence . . . [which] goes to the reasonableness of the appellant's conduct in making its design choice . . . would have improperly brought into the case concepts of negligence law. We also conclude that *such evidence would have created* ***a strong likelihood of diverting the jury's attention*** from the appellant's control box to the reasonableness of the appellant's conduct in choosing its design. For those reasons *we*

> *conclude that the trial court correctly ruled the evidence to be* ***irrelevant and hence inadmissible.*** It is well established that *a trial court should exclude* ***evidence which has a tendency to distract the jury from its main inquiry or confuse the issue."*** (Emphasis added)

Thus the evidence was clearly inadmissible under both Fed. R. Evid. 402 and 403. And it should be noted that time and time again, in cases set forth in the previous section of this brief regarding Pennsylvania strict liability law, defense verdicts have been consistently reversed when ***any*** of this irrelevant negligence-type evidence has been admitted because the courts have uniformly found it to be highly prejudicial and to substantially affect the rights of the parties.

Defendants-petitioners have merely set up the proverbial straw man and then attempted to knock it down. In assessing the verbal formulation of the standard, rather than how it is actually used in practice, they have attempted to pit the Third, Eleventh, and D.C. Circuits against the Eighth, Ninth and Tenth Circuits. Not only do they ignore that the First Circuit uses the same highly probable standard as the Third Circuit, *Harrison v. Sears, Roebuck and Co.*, 981 F.2d 25, 29 (1st Cir. 1992), but either verbal formulation of the standard has easily been met in the instant case.

Furthermore, not only is the Third Circuit's careful and scholarly analysis in *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916 (3rd Cir. 1985) correct, but petitioners ignore the manner in which the standard is actually applied in practice. In using the highly probable verbal formulation, the Third Circuit reversed in *Habecker II* only

after concluding that "a substantial possibility exists that the inadmissible evidence influenced the jury" (App. 26a), thus giving short shrift to petitioners' argument that cases are being reversed right and left where the evidentiary errors had no effect on the case's outcome.

And note how the D.C. Circuit interprets its standard. In *Barth v. Gelb*, 2 F.3d 1180, 1188 (D.C. Cir. 1993), the court acknowledged that its standard, set forth in *Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1022-1023 (D.C. Cir. 1990), had its basis in *Kotteakos v. United States*, 328 U.S. 750 (1946):

> "In *Williams*, we stated that in determining whether an error in a civil case was harmless, '[t]he proper inquiry is "whether the error itself had substantial influence. If so, or if one is left in grave doubt, the [verdict] cannot stand." . . . This inquiry "involves an assessment of the likelihood that the error affected the outcome of the case." ' *Id.*, at 1023 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765. . . .)."

In *Kotteakos*, *supra* at 764, this Court stated that:

> "[T]he question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."

This Court held, *supra* at 765:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the

> judgment was not substantially swayed by the error, *it is impossible to conclude that substantial rights were not affected.* The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the [verdict] cannot stand." (Emphasis added)

All of the circuits, in actual practice, apply their standards similarly, no matter how worded, and do not reverse unless there is substantial prejudice as a result of the error. *See, e.g., McGowan v. Cooper Industries, Inc.*, 863 F.2d 1266, 1271 (6th Cir. 1988), in which the court found that the exclusion of evidence was "inconsistent with substantial justice" where the exclusion was "unfairly prejudicial to the appellants". In assessing whether the error affected the substantial rights of the parties, none of the circuits, no matter how their verbal standard is worded, rush to reverse judgments unless the error has in fact had substantial influence on the verdict. This Court in *Kotteakos* acknowledged that an individualized weighing process must take place in each and every case. There is no indication, and no empirical evidence, that any circuit is in fact applying the harmless error standard in such a haphazard fashion that cases in which quite minor errors occur, errors which could not have affected the outcome of the case, are being reversed. There is really no problem in fact. We have nothing but petitioners' hyperbole. Petitioners attempt to bring their own specious statistical analysis to this Court, an analysis which eliminates a myriad of relevant factors, but they have not supplied this Court with any concrete cases at all in

which it is claimed that a different result would obtain if the verbal standard was different.

Finally, respondents assert that petitioners have waived this issue and/or are estopped from raising it. They told the Third Circuit to use the very standard of which they now complain. The evidentiary error was presented by plaintiffs, as always, as Issue I. In defendant Clark's argument on Issue I in its brief to the Third Circuit, it stated, p. 31, n. 26:

> "Defendant agrees that if the admission of evidence is deemed erroneous it is subject to the harmless error review and judgment for defendant should not be set aside if it is highly probable that the jury would have reached the same verdict without hearing the allegedly inadmissible evidence."

Defendant Forklifts, in its brief, p. 13, stated only that it

> "incorporates by reference and adopts the standard of review and argument set forth by Clark Equipment Company in its Brief on this issue."

Having told the Third Circuit to apply the highly probable standard, defendants are hardly in a position to complain that the court applied that standard. Any error claimed was invited and defendants should be held to have waived the issue and to be estopped from raising it.

II. EVIDENCE WHICH IS INADMISSIBLE BECAUSE IT IS IRRELEVANT, AND BECAUSE IT CONFUSES THE ISSUES AND MISLEADS THE JURY, DOES NOT BECOME AUTOMATICALLY ADMISSIBLE JUST BECAUSE IT COMES OUT OF THE MOUTH OF AN EXPERT.

Contrary to petitioners' assertion, this case does not present any issue as to whether expert testimony is governed by the Federal Rules of Evidence or substantive state law. Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), the trial court is required to make an initial determination as to whether the evidence is relevant. Since it is undisputable that the evidence proffered was totally irrelevant under established Pennsylvania strict liability law, the mere fact that the irrelevant and inadmissible evidence came from the mouth of an expert did not transform it into admissible evidence. Furthermore, *Daubert* confirms that Fed. R. Evid. 403 applies to expert testimony. Since settled Pennsylvania authority clearly holds that any evidence such as that introduced by defendants does not belong in a strict liability case because it diverts the jury from the issue of the defectiveness of the product to the irrelevant issue of the reasonableness of the manufacturer's conduct, and thus confuses the issues and misleads the jury, it would also be clearly inadmissible under Rule 403.

Petitioners would have this Court adopt the novel concept that evidence which is inadmissible because it is absolutely irrelevant, and because it confuses the issues and misleads the jury, all as established by settled authority, is somehow rendered automatically admissible under

Fed. R. Evid. 702 just because the irrelevant and prejudicial evidence comes out of the mouth of an expert. That proposition would turn the entire concept of relevant evidence on its ear, would make a mockery of all of the rules of evidence, and would effectively destroy established state substantive law in violation of the *Erie* doctrine as well.

Incredibly, petitioners base their argument on *Daubert*. It is readily apparent that petitioners have engaged in a selective reading of *Daubert* and have ignored many of its central holdings which stop petitioners' arguments in their tracks. First and foremost is *Daubert*'s holding on the issue of relevance. This Court held, 113 S.Ct. at 2795-2796:

> "Rule 702 further requires that the evidence or testimony 'assist the trier of fact to understand the evidence or *to determine a fact in issue.*' ***This condition goes primarily to relevance. 'Expert testimony which does not relate to any issue in the case is not relevant and, ergo, nonhelpful.***' 3 Weinstein & Berger ¶ 702[02], p. 702-18." (Emphasis added)

This Court further held, 113 S.Ct. at 2799:

> "To summarize: . . . the Rules of Evidence – especially Rule 702 – do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation ***and is relevant to the task at hand.***" (Emphasis added)

The testimony introduced by defendants did not relate to any issue in the case, *i.e.*, the defectiveness in the product, but instead related to and focused upon the

issue which was irrelevant as a matter of settled Pennsylvania authority in a strict liability action, the reasonableness of the manufacturer's conduct in making its design decision. Since it did not relate to any issue properly in the case, it did not assist the jury to determine a fact in issue, was not relevant, was nonhelpful, and did not meet the requirements for admissibility under Rule 702 under the clear holding of *Daubert*.

It should also be apparent that any other holding would be contrary to the dictates and principles of *Erie* because it would effectively gut Pennsylvania's strict liability products liability law which that state has taken such pains to carefully develop over the decades. If evidence is allowed to be admitted in a federal court trial through the mouth of an expert, despite the fact that the evidence is wholly irrelevant to the concept of strict liability, but relates only to the irrelevant issue of the reasonableness of the manufacturer's conduct, then all that the state has sought to accomplish in its development of strict liability will be lost. Federal court products liability trials will effectively be negligence trials, not strict liability cases, because all of the irrelevant and otherwise prohibited negligence-type evidence, together with all of the extensive argument thereon, will be before the jury, just as happened in the instant case. In short, Pennsylvania strict products liability law will cease to exist. While this is precisely the result sought by petitioners, *Erie* will not permit it.

Nor is there any merit to petitioners' argument that the inadmissible state of the art, negligence-type knowledge and conduct evidence should be admissible for another purpose such as to test the opinion of an expert

witness or his credibility. *See, e.g., Minichello v. U.S. Industries, Inc.*, 756 F.2d 26, 29 (6th Cir. 1985):

> "It attempts to argue, nonetheless, that the OSHA regulations may have been admissible ***for the limited purpose of testing whether the expert witness was correct in his opinion*** that the bolster plate was defective. What counsel for U.S. Industries describes as a limited purpose ***is not a limited purpose at all***, however. The question of whether the expert was right in considering the plate defective merges into the question of whether the plate was defective. ***The so-called limited purpose for which the evidence was purportedly admitted, then, is inseparable from the purpose for which we have shown the evidence would have been inadmissible.***" (Emphasis added)

Followed, Bailey v. V & O Press Co., Inc., 770 F.2d 601, 608-609 (6th Cir. 1985).

This Court also made it clear in *Daubert*, 113 S.Ct. at 2797-2798, that Fed. R. Evid. 403 applies to expert testimony:

> "Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules. . . . Rule 403 permits the exclusion of relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . . ' Judge Weinstein has explained: 'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge, in weighing possible prejudice against probative force under Rule 403 of the present rules, exercises

more control over experts than over lay witnesses.' Weinstein, 138 F.R.D. at 632."

As the court clearly and specifically held in *Lewis, supra* at 594, the evidence which defendants introduced in this case, and which defendants argued extensively to the jury, was "evidence . . . [which] goes to the reasonableness of the appellant's conduct in making its design choice" and therefore was evidence which "improperly brought into the case concepts of negligence law." Just as in *Lewis*, "such evidence . . . created **a strong likelihood of diverting the jury's attention** from the [product] to the reasonableness of the appellant's conduct in choosing its design." "For those reasons", not only was the evidence "irrelevant and hence inadmissible", but also, as the court so specifically held in *Lewis*, that very evidence which the defendants herein introduced was required to be excluded because it "**has a tendency to distract the jury from its main inquiry or confuse the issue.**" In other words, the evidence was required to be excluded because of the very factors set forth in Fed. R. Evid. 403.

For the above reasons, there is no issue to be decided by this Court because there is no conflict whatsoever in this case between the Federal Rules of Evidence and state substantive law. Indeed, this case is an illustration of a situation in which they complement each other rather nicely. State substantive law informs the federal court what is and is not relevant in a strict liability case, and the federal court is then able to exclude the irrelevant expert testimony, consistent with the dictates of Rule 702, *Daubert*, and *Erie*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GERALD F. POSNER
(Counsel of Record)
SAMUEL POSNER
POSNER, POSNER AND POSNER
712 Penobscot Building
Detroit, Michigan 48226
(313) 965-7784
Attorneys for Respondents

Of Counsel:

HY MAYERSON
MAYERSON, MUNSING,
CORCHIN & ROSATO, P.C.
3540 Schuylkill Road
Spring City, PA 19475
(610) 948-4800

(3)

No. 94-1060

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CLARK EQUIPMENT COMPANY AND FORKLIFTS, INC.,
Petitioners,

v.

CONNIE L. HABECKER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN R. HABECKER, DECEASED, AND JOHN MICHAEL HABECKER, MINOR, BY CONNIE L. HABECKER, HIS PARENT, NATURAL GUARDIAN AND NEXT FRIEND,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF

Of Counsel:
DAVID C. FIELD
CLARK MATERIAL HANDLING COMPANY
333 West Vine Street
Lexington, KY 40507
(606) 288-1216

STANLEY V. BOYCHUCK
SWANSON, MARTIN & BELL
One IBM Plaza
Chicago, IL 60611
(312) 321-9100

RICHARD W. HOLLSTEIN
THOMAS J. COLE
CLARK, LADNER, FORETENBAUGH & YOUNG
2005 Commerce Square-21st Floor
Philadelphia, PA 19103
(215) 241-1800

JOHN A. STATLER
GOLDBERG, KATZMAN & SHIPMAN P.C.
320 Market Street
Strawberry Square
P.O. Box 1268
Harrisburg, PA 17108-1268
(717) 234-4161

VICTOR E. SCHWARTZ *
ROBERT P. CHARROW
JOSEPH N. ONEK
LISA A. PRICE
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 624-2500
Attorneys for the Petitioners

* *Counsel of Record*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1060

CLARK EQUIPMENT COMPANY AND FORKLIFTS, INC.,
Petitioners,

v.

CONNIE L. HABECKER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN R. HABECKER, DECEASED, AND JOHN MICHAEL HABECKER, MINOR, BY CONNIE L. HABECKER, HIS PARENT, NATURAL GUARDIAN AND NEXT FRIEND,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

Respondents, in their brief in opposition, never deny that the two issues raised in the petition are significant, nor do they deny that there are concrete intercircuit differences with respect to each. Instead, their opposition focuses almost exclusively on the merits of their claims at trial, claims which have been rejected by three successive juries. Having been tried three times already, this case highlights the untoward effect on appellate decision-making of using a standard of review, the "highly probable" standard, that is so rigorous and hypertechnical that even a minor error can mandate reversal and costly retrial. Also, this case emphasizes concretely the disquieting and persistent tension between state substantive

law and the conflicting requirements of the Federal Rules of Evidence.

1. Petitioners,[1] in their opening brief, noted "that the circuits are divided on the appropriate standard of review to apply in gauging the effect of an error in a civil case." *Williams v. United States Elevator Corp.*, 920 F.2d 1019, 287 U.S. App. D.C. 225, 229 (1990). Three circuits, including the Third Circuit, only affirm if it is "highly probable" that the error did not affect the verdict. In contrast, three other circuits use the normal civil standard and affirm if it is "more probable than not" that the error did not affect the verdict. Respondents do not deny that there is a crisp and real split in the circuits. Indeed, they characterize the circuit split as being even deeper, involving more circuits, than had petitioners. Despite that split, respondents maintain that the standard of review on appeal really is not important and that "[a]ll of the circuits, in actual practice, apply their standards similarly, no matter how worded . . . ." Respondents at 21. Not surprisingly, respondents point to no authority to support their novel hypothesis, as none exists.[2] Virtually every court and every scholar that has examined the issue has recognized that the standard of review, like the burden of proof, is a critical factor in judicial decision-making that has discernible implications for the appellate process.

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[1] Petitioners' Rule 29.1 Listing is set out at page ii of their opening brief and is incorporated by reference.

[2] The Third Circuit, which uses the "highly probable" standard, reverses civil judgments nearly 65% more often than the Ninth Circuit, which uses the "preponderance of the evidence" standard. Respondents assert that our statistics are specious, but provide no basis for such an assertion. The methodology underlying the survey of harmless error cases was detailed in our opening brief. Respondents therefore had the opportunity to replicate that study. Their failure to highlight any deficiencies in that study must be taken as an admission that they found none. That study revealed that the specific harmless error standard used by an appeals court affects the civil reversal rate. Those findings were statistically significant.

See Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decisions*, 72 CORNELL L. REV. 1115 (1987); ROGER TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970). Indeed, using respondents' logic, it really does not matter whether the burden of proof in a civil case is proof by a preponderance of the evidence, proof by clear and convincing evidence, or proof beyond a reasonable doubt. Somehow, according to the respondents, the human mind processes and treats all three standards similarly. We are aware of no court or indeed, of no law student, that would make such a claim.

2. Respondents are left to argue that this case is not an appropriate vehicle for resolving the clear circuit conflict. Simply stated, respondents continuously assert that the trial or trials were so "permeated" by error that reversal was mandated no matter which standard of review the Third Circuit used. Respondents at 5. 12. 12. 17. This argument is based solely on obfuscation: respondents have combined three trials worth of errors. Significantly, respondents do not deny that *Habecker III* involved only a single error: according to the Third Circuit, defendants' expert witness should not have been permitted to give the basis of his opinion testimony. Ironically, the Third Circuit never held that the expert's opinion was inadmissible, only the basis for that opinion. It is difficult to see how a single error involving a single aspect of a single witness's testimony in a two-week trial qualifies the trial as one "permeated" by error.

Stripped of its rhetoric, respondents' argument is a series of inferential leaps based on the erroneous assumption that *Habecker II* and *Habecker III* were interchangeable trials involving identical errors. First, they assert that the Third Circuit's harmless error analysis in *Habecker II* would have mandated reversal irrespective of which standard was used. They then go on to assert, without the benefit of citation, that *Habecker III* in-

volved identical issues as did *Habecker II* and thus, under any standard of review, the error in *Habecker III* could not have been harmless. This argument suffers from one fatal flaw: *Habecker II* and *Habecker III* were different cases, decided by different panels, involving different issues of fact and different issues of law on appeal. Significantly, the trials themselves involved different alternate designs. Under Pennsylvania product liability crashworthiness law, whether a product is defective is based on a comparison of that product with an alternative design. A product liability plaintiff, as part of its case-in-chief, is required to identify an alternate design that was not only feasible at the time the original product was manufactured, but which also would have made that product safer. *See Hammond v. Int'l. Harvesters Co.*, 691 F.2d 646 (3d Cir. 1982). In *Habecker II*, the respondents chose, as their alternate design, the Operator Restraint System ("ORS") developed by Clark in 1983 and patented in 1986. Since the 1983 ORS made the forklift safer in many situations, respondents had to prove that design was feasible in 1977. Thus, *Habecker II* focused exclusively on "feasibility." In contrast, in *Habecker III*, respondents, recognizing that they could not prove that Clark's 1983 ORS was feasible in 1977, the year in which the forklift was manufactured, abandoned reliance on the ORS and instead opted to use as their alternate design an ordinary automobile seat belt and chair wings. Since ordinary lap belts were admittedly feasible in 1977, the focus of *Habecker III* was not on feasibility, but on safety—would ordinary seat belts have made the forklift safer.

Inasmuch as the two cases were factually different—using different alternate designs—the legal issues on appeal were different. Specifically, in *Habecker II* the court of appeals reversed for four reasons: (1) the trial court erroneously admitted into evidence a computer simulation (App. 35a); (2) the trial court improperly permitted defendants to make a "state of the art" defense (App.

32a); (3) the trial court failed to provide the jury with a cautionary instruction (App. 35a-36a); and (4) defense counsel's closing argument emphasized the computer simulation and state of the art defense (App. 36a). *Habecker III*, in contrast, did not turn on any computer simulation: none was offered, none was admitted, and none was discussed in closing argument. Correspondingly, no state of the art defense was asserted, and the cautionary instruction that was not given in *Habecker II*, and which formed the basis for reversal in that case, was in fact given in *Habecker III*. Finally, the court of appeals in *Habecker III* pointed to nothing improper in the defense counsel's closing argument.[3]

In sum, the errors in *Habecker II*, according to the Third Circuit, involved the erroneous admission of a computer simulation, the inappropriate use of the state of the art defense, the failure to give a proper jury instruction, and the tenor of the closing argument. *Habecker* III involved none of these issues or errors and instead, turned exclusively on but a single evidentiary issue—whether defendants' expert witness should have been permitted to explain to the jury the reasoning underlying his opinion. Given the limited and hypertechnical nature of the error, this is a case where the standard of review would have made a difference in the outcome on appeal. *Habecker III* was not a close case, a fact not meaningfully challenged by respondents. Where a case is not close, common sense dictates, the reasoning of this Court requires, and studies of jury behavior confirm, that the admission of irrelevant evidence should have little or no effect on a verdict. *See Kotteakos v. United States*, 328 U.S. 750,

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[3] Respondents dwell on Petitioner Clark's closing argument which noted that Clark had not acted in bad faith. The Third Circuit, however, found nothing improper with that argument. Indeed, reference to Clark's conduct in petitioner's closing argument was only made after respondents addressed this issue during their closing argument. *See* R. 2025A; R. 2029A; R. 2040A.

762 (1946); Stanley Sue, Ronald E. Smith, and Cathy Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APP. SOCIAL PYSCH. 345, 351 (1973).

3. Finally, respondents fault petitioners for adhering to the published Internal Operating Procedures of the Third Circuit. In particular, respondents, citing to a footnote in petitioners' brief before the Third Circuit, argue that petitioners invited the Third Circuit to apply the "highly probable" standard. Such is not the case. The quotation that respondents reference in their opposition brief was artfully truncated to delete the fact that use of the "highly probable" standard was mandated by the Third Circuit's holding in *Habecker II*. *Habecker II* in turn was based on the leading Third Circuit case, *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916 (3d Cir. 1985), which first established the "highly probable" standard in the Third Circuit.[4] The "highly probable" standard was and remains the binding law of the Third Circuit and a litigant, in the Third Circuit, is obligated to follow that law. *Ellison v. Shenango Inc. Pension Bd.*, 956 F.2d 1268, 1274 (3d Cir. 1992) (panel bound by law of the circuit embodied in prior case on issue); *United States v. Babich*, 785 F.2d 415, 417 n.2 (3d Cir. 1986) ("A panel of this court is bound by precedents") (citations omitted); *Cuban ABA, Inc. v. Christopher*, 1995 U.S. App. Lexis 943, *25-*26, n.8 (11th Cir. 1995) (no weight accorded to district court decision which failed to

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[4] That *McQueeney* is the established law of the circuit is beyond doubt. *Lippay v. Christos*, 996 F.2d 1490 (3d Cir. 1993) (reversing district court decision); *Advanced Medical v. Arden Medical Systems*, 955 F.2d 188 (3d Cir. 1992) (reversing district court decision under the "rigorous" *McQueeney* standard); *Reed v. Philadelphia, Bethlehem & New England R.*, 939 F.2d 128 (3d Cir. 1991) (vacating judgment of the district court); *Petree v. Victor Fluid Power, Inc.*, 887 F.2d 34 (3d Cir. 1989) (vacating district court decision).

follow the law of the circuit and instead relied on decision by Eastern District of New York). Moreover, the Internal Operating Procedures of the Third Circuit provide that a published opinion of the court expressed by a panel may not be overruled without the approval of a majority of the full court. IOP, Chapter 9; *see United States v. Babich*, 785 F.2d 415, 417 n.2 (3d Cir. 1986). Petitioners unsuccessfully sought *en banc* review. *See* App. 87a. In short, far from promoting the use of the "highly probable" standard, petitioners were merely indicating that their harmless error analysis was predicated on *Habecker II*—the law of both the case and of the circuit.

4. Respondents fail to meaningfully address the second issue before this Court, namely whether the admission of expert evidence is governed by the Federal Rules of Evidence or state substantive law. Once again, respondents do not deny that the circuits have failed to adopt a uniform and cohesive analysis concerning this issue. Instead, they argue the merits and urge that state substantive law should take precedence over the Federal Rules where the two are in conflict. Indeed, their entire argument underscores the complexity and importance of resolving this issue. For example, respondents argue that if Federal Rules were to take precedence over state substantive law then "all that the state has sought to accomplish in its development of strict liability will be lost." Respondents at 25. Whether the Federal Rules of Evidence ought to have this effect is precisely the issue that this Court should resolve.

Respondents also attempt to argue that under Fed. R. Evid. 702 and 403 the evidence at issue should not have been admitted. However, this argument is premised on circular reasoning: it is based on the assumption that state substantive law should take precedence over the mandate of the Federal Rules of Evidence. Specifically, respondents argue that the basis of the expert's opinion is not relevant by operation of state law and since it is

not relevant it cannot assist the trier of fact. This argument, though, begs the question of whether the Federal Rules take precedence over conflicting state law. Respondents also argue that the evidence was irrelevant under Fed. R. Evid. 702 as interpreted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). However, Fed. R. Evid. 702 deals with the admissibility of an expert's opinion. The Third Circuit did not hold, as respondents imply, that the expert's opinion was inadmissible or irrelevant. It only held, contrary to Fed. R. Evid. 703 and 705, that the bases of his opinion were inadmissible. Respondents' discussion of Fed. R. Evid. 403 is beside the point and has nothing to do with this case. That rule only comes into play once the evidence is deemed relevant. Here, the Third Circuit held at the outset that such evidence was not relevant, and hence, no Rule 403 analysis was ever performed by the Third Circuit.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Of Counsel:
DAVID C. FIELD
CLARK MATERIAL HANDLING COMPANY
333 West Vine Street
Lexington, KY 40507
(606) 288-1216

STANLEY V. BOYCHUCK
SWANSON, MARTIN & BELL
One IBM Plaza
Chicago, IL 60611
(312) 321-9100

RICHARD W. HOLLSTEIN
THOMAS J. COLE
CLARK, LADNER, FORETENBAUGH & YOUNG
2005 Commerce Square-21st Floor
Philadelphia, PA 19103
(215) 241-1800

JOHN A. STATLER
GOLDBERG, KATZMAN & SHIPMAN, P.C.
320 Market Street
Strawberry Square
P.O. Box 1268
Harrisburg, PA 17108-1268
(717) 234-4161

VICTOR E. SCHWARTZ *
ROBERT P. CHARROW
JOSEPH N. ONEK
LISA A. PRICE
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 624-2500
Attorneys for the Petitioners

* *Counsel of Record*